HIGH COURT OF GUJARAT

K P PATEL
V/S
GUJARAT SMALL INDUSTRIES CORPORATION LIMITED

Date of Decision: 16 June 1980

Citation: 1980 LawSuit(Guj) 105

Hon'ble Judges: B K Mehta

Eq. Citations: 1980 (2) GLR 202, 1981 LabIC 1550

Case Type: Special Civil Application

Case No: 2278 of 1979

Subject: Constitution

Head Note:

[A] Constitution of India, 1950 - Art.226 - Power of High Court to issue writ of mandamus - Order of termination will not survive of it is violative of Art.14, Art.16 - Therefore High Court is entitled to grant consequential relief in respect of continuing in service - Such relief cannot be considered to be writ of mandamus. [B] Constitution of India, 1950 - Art.12, Art.14, Art16 - Gujarat Small Industries Corporation is State within the scope of Art.12 - It works as instrumentality of state and as such subject to same limitations in respect of constitutional and administrative law - It is, therefore bound by mandate of Art.14 and Art.16. [C] Service Law - Constitution of India, 1950 - Art.14, Art.16 - Only on the grounds of contract service cannot be terminated - Any case not made our for termination - Therefore such order of termination violates Art.14 and Art.16

Writ of mandamus under Art. 226 of the Constitution is issued to secure the purpose of public duty or statutory duty in the performance of which the person

seeking writ of mandamus has sufficient legal interest. An order of mandamus is in form a command directed to a person Corporation or inferior Tribunal to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Though it is not necessary that the person or authority under such statutory obligation be necessarily a public official or an official body. (Para 6) The relief prayed in this petition is for quashing and setting aside the impugned order of termination inter alia on the ground that it transgresses the mandate of Articles 14 and 16 of the Constitution and therefore non est. In other words the relief is for a writ or direction in the nature of certiorari. If the petitioner succeeds to make his challenge good against the impugned order it would amount to a situation as if it is does not exist. The consequential direction about treating him as continuing in service as if the impugned order had not been made and to pay him salary and accord him all other benefits retrospectively on that basis is a direction which will be well within the jurisdiction power and authority of the High Court under Art. 226 of the Constitution. This relief will not amount to a writ of mandamus stricto sensu because it is a common for securing the pur- pose of a public or a statutory body. In the second place the High Court will have jurisdiction to issue a writ of mandamus if the respondent-Corporation is held to be an agent of the State. (Para 7) Constitution of India 1950 - Articles 12 14 16 - Gujarat Small Industries Corporation is State within the meaning of Art. 12 - Corporation works as instrumentality of the State and as such subject to same limitations in the field of constitutional and administrative law - Therefore it is also bound by mandate of Arts: 14 and 16 Held that Gujarat Small Industries Corporation Ltd. is an agent or instrument- ality of the State Government of Gujarat. The obvious reason for this conclusion is apart from the extent of financial assistance and the degree of control of the State over the respondent-Corporation the governmental functions of the Industry Department of promotion protection and assistance of small scale industry is completely transferred to the respondent-Corporation. The public nature of the functions of the respondent Corporation is impregnated with the Governmental character or in any case tied or entwined with Government so as to render the respondent-Corporation an instrumentality or agency of the State Government. The objects of recommending guarantee and grant of loans and advances to small indust- rial units and procurement of important raw material like coke and coal and arrangement for the distribution thereof among industries as prescribed in clauses (28) and (4) and establishment development and management of industrial estates and providing for civil facilities like electric

supply railway sidings and warehouses are classical governmental functions or in any case they are in the nature of governmental functions or in any case they are in the nature of Governmental functions and therefore impregnated with the governmental character which rendered the respondent-Corporation an agent of the State. Besides this public nature of the functions having governmental character the degree of control which is so deep and pervasive as to empower the State Government issue directions or instructions of binding nature not only in the conduct of the business of the Company or the Directors but also in the affairs thereof and thus clearly circumscribe the policy waking or routine day-to-day management by the Directors of the Company who ate obliged by clause 68 to comply with and give immediate effect to such directions and instructions. The State Government also weilds effective control over the policy making and day-to-day management by the Directors of the business and affairs of the Company by appointing 1/3rd number of directors of the Board as its nominees who are not liable to retire by rotation or be removed by the Company. Coupled with this power contained in clause 70 of the Articles of Association the State Government will have a majority in the remaining directors to be elected by the shareholders since it holds 65% of the issued and subscribed share-capital. The Man- aging Director is a State nominee who has not to depend for his term or remuneration on the decision of the Board of Directors. The substantial extent of financial assistance the deep and pervasive State control the majority of the directors on the Board being the State nominees or State electees and the public nature of the functions of governmental character rendered the respondent-Corporation as an instrumentality or agency of the State. (Para 15) The respondent-Corporation is an instrumentality and agency of the State and as such subjected to the same limitations in the field of constitutional and admini- strative law as State itself and therefore bound by the mandate of Articles 14 and 16 of the Constitution. (Para 16) Service Law-Constitution of India 1950 - Articles 14 16 - Services cannot be terminated only on basis of contract - No Case made cut for termination - Such order of termination therefore violative of Articles 14 and 16. The power of termination cannot be pressed purely on the basis of contract of service and could not be justified as unfettered right to hire and fire its employees unless the employees has lost confidence or betrayed the trust of the employer or for exigencies of service. Therefore the impugned order of termination is arbitrary and therefore violative of Articles 14 and 16 of the Constitution and more so because no case has been made out that the petitioner had betrayed the trust or

that there was a loss of confidence for exigencies of service. (Para 17) Shri Sohan Lal v. Union of India & Anr. Praga Tolls Corpo. v. C. V. Imanual & Ors Rohtas Industries Ltd. & Anr. v. Rohtas Industries Staff Union & Ors Heavy Engineering Mazdoor Union v. State of Bihar & Ors State Trading Corpo. of India Ltd. v. Commercial Tax Officer Ramana Dayaram Shetty v. The International Airport Authority of India & Ors A. S. Ahluwalia v. State of Punjab Sukhdev v. Bhagatram Vitarelli v. Seaton Marsh v. Alabama Agar- wal v. Hindustan Steel Ltd. R.D. Singh v. Secretary Bihar State Small Industries Ranjit Kumar Chatterjee v. Union of India & Ors J. Ganapathy & Ors. v. Managing Direetor Nellore Co. Op. Spg. Mills Ltd. Spl. C.A.No. 962/75 decided by GHC on 23 Rajasthan State Electricity Board v. Mohanlal Amarsing S. Madalia v. Guj. S.R.T. Corp. referred to.

Acts Referred:

Constitution Of India Art 16, Art 226, Art 12, Art 14

Final Decision: Petition allowed

Advocates: N J Mehta,K S Nanavati

Reference Cases:

Cases Referred in (+): **25**

Judgement Text:-

B K Mehta, J

[1] By this petition under Article 226 of the Constitution of India, the petitioner, who is a confirmed Assistant Manager (works) in the employment of the respondent-Corporation, challenges the order of April 22, 1979 Annex-ure "K" to the petition of termination of his services passed by the Managing Director of the respondent-Corporation, inter alia, on the ground that in effect and substance it was an order of penalty and inasmuch as it was made without giving any opportunity to the petitioner of being heard, it is a nullity. In any case it is assailed as arbitrary and therefore, violative of Articles 14 and 16 of the Constitution of India. A few facts need be noticed in order to appreciate the challenge to the impugned order.

[2] The petitioner joined the services of the Corporation as Setter cum Operator in

September 1969 on probation for a period of six months with a consolidated salary of Rs. 375/- per month. He was confirmed on satisfactory completion of the probationary period by the order of March 12, 1970 with effect from December 31, 1969 and placed in the consolidated grade of 350-30-500 with initial consolidated salary of Rs. 440/- per month. By an order of the Corporation of May 16, 1970 the designation of the post of the petitioner was changed to that of Foreman of the Scooters Project Division of the Corporation. It is claimed by the petitioner that he was given his increment in May 1970. By an order of January 3, 1972, the petitioner was given substantive posting as Foreman with retrospective effect from 1st October, 1971 with a consolidated salary of Rs. 565/- per month in the grade of Rs. 350-625. An office order was issued accordingly setting out the terms and conditions of his substantive appointment. The said order, inter alia, provided for termination of the services by giving one month's notice on either side. In June, 1973, the Maintenance Department of the Workshop of the Scooters Project Division was also placed in-charge of the petitioner. The petitioner was promoted to the post of Assistant Manager-Services with effect from 1st September 1977 at the salary of Rs. 910/ - per month in the time-scale of Rs. 850-30-1000-EB-40-1430 and he was placed in-charge of 4 departments, namely, (a) Tool room, (b) Maintenance, (c) Try-out & proving of Production standards, and (d) Inspection Erection & Commissioning of new plant and machinery. By an order of June 11,1978 he was put in-charge of Machine-shop, Welding, Paint shop, Assembly and Despatch section and his salary was increased and fixed at Rs. 1200/- in the said time-scale and he was made accountable for the production, discipline and rejection in all these departments. His designation was, however, changed from Foreman to that of Assistant Manager (works) with the condition that he would be confirmed on the said post after six months subject to satisfactory performance. By an order of January 4, 1979, the petitioner was confirmed on the post of Assistant Manager (works) Girnar Scooter project with effect from the date of completion of his six months probation period. On February 23, 1979 he was given one increment of Rs. 80/-. It is claimed by the petitioner that he achieved and fulfilled the target of 300 scooter engines and his confidential remarks were consistently good, and that no adverse remarks were ever communicated to him. He asserted that his performance was exemplary and won the respects of subordinates and regards of his superiors. According to the petitioner, the General Manager of the Scooter Project sought support and Co-operation of the petitioner in the conspiracy hatched by the Management for committing unfair labour practice by suspending and holding inquiry against two union leaders Shri Natubhai Dodia and V. N. Shah with the ulterior motive of removing them from service. The petitioner was required by the General Manager to give favourable statements and evidence against these leaders

which the petitioner declined to join unholy alliance to substantiate false and trumped up charges. It is this stand of the petitioner which enraged the management who decided to terminate the services of the petitioner also and was abruptly served with an order of termination of April 22, 1979. However, to the surprise of the petitioner by the confirming letter of April 22, 1979 under the signature of the General Manager (SP), on behalf of the respondent-Corporation, he was intimated that since he refused to accept the termination order in person, a telegram was sent intimating that he was no longer in the service of the Corporation with effect from the said date after factory hours and that the order was confirmed by the letter in question The petitioner by telegram of July 23, 1979 requested for reasons of termination since it was without any cause or reason and in violation of the rule of law. Since there was no response from the respondent-Corporation, the petitioner moved this Court by this special civil application for appropriate writs, orders and directions to quash and set aside the impugned order of termination of services and for a declaration to treat the petitioner as if in service all along and to grant him all the benefits he was entitled to.

[3] This petition was resisted by the Corporation and an affidavit of one Shri C. Narayan, General Manager of the Girnar Scooters Project a Division of the respondent-Corporation has been filed contending, inter alia, that the respondent-Corporation was not "State" within the meaning of Article 12 of the Constitution of India, and that, in any case, no writ of mandamus can be issued to the respondent-Corporation which is a public limited company registered under the Companies Act, 1956. It was conceded in the said affidavit-in-reply that the petitioner was a confirmed employee and has earned four promotions in last about nine years though his last confidential report was not good, and the Corporation reserved their liberty to refer to and rely upon the said confidential report in respect of the petitioner. The respondent-Corporation specifically joined issue in this affidavit-in-reply about the sincere, satisfactory and diligent working of the petitioner by denying the assertions made in that behalf in the petition. The respondent-Corporation reserved liberty to refer to and rely upon the memos as well as confidential reports of the relevant years as and when necessary. The respondent-Corporation specifically controverted and denied the allegation made by the petitioner that since he refused to fall in line with the management for committing unfair labour practice of victimising trade union leaders, his services were terminated. It was claimed on behalf of the Corporation that the services were terminated according to the terms contained in the contract, and particularly condi tion No. 8 of the office order of January 3, 1972 by which the petitioner was substantively appointed as foreman, which provided that the services were liable to be terminated by giving one month's notice on either side and,

therefore, the respondent-Corporation was under no obligation to assign and communicate any reasons to the petitioner. It has been claimed by the respondent-Corporation in the said affidavit-in-reply that the Managing Director had considered the case of the petitioner, and after fully applying mind a decision to terminate the services was taken. The respondent-Corporation contended that the petition was not competent since it is a Company established under the Companies Act and is not an instrument, instrumentality or agency of the State and, therefore, amenable to the mandate of Articles 14 and 16 of the Constitution since it is not an authority or State within the meaning of Article 12 of the Constitution of India.

[4] At the time of hearing of this petition, a preliminary objection was raised on behalf of the respondent-Corporation that the petition is entirely misconceived and no writ of mandamus or a writ of certiorari can be issued against the respondent-Corporation which is a public limi ted company incorporated under the Companies Act, 1956. I will deal with the preliminary objection while considering the contentions of the petitioner since it will necessarily require to be decided whether the respondent-Corporation is an agent or instrumentality of the State and, therefore, amenable to the mandate of Articles 14 and 16 of the Constitution

[5] Mr. Mehta, learned Advocate for the petitioner, has urged the following contentions :

(1) The impugned order of termination is arbitrary and, therefore, bad in law and void since no reasons have been assigned therein, nor disclosed in the affidavit-in-reply for the petitioner's removal from the service of the Corporation within less than two months after his confirmation on such a senior position as Assistant Manager (works) where he earned two increments and, therefore, violative of Articles 14 and 16 of the Constitution of India.

(2) The impugned order of termination is in colourable exercise of the power and in effect and substance is an order of dismissal passed contrary to all the recognised principles of natural justice and fair play and, therefore, a nullity.

(3) In any case, notwithstanding the power of termination, the respondent-Corporation cannot press the power of termination purely on the basis of the

contract of service and justify its unfettered right to hire and fire its employees unless he believes bona fide that the employee has betrayed the trust or that there was a loss of confidence, or for exigencies of service.

[6] It is well established on principle and in authority that writ of mandamus is issued to secure the purpose of public duty or statutory duty in the performance of which the person seeking writ of mandamus has sufficient legal interest. An order of mandamus is, in form a command directed to a person, Corporation or inferior Tribunal to do a particular thing therein specified which apertains to his or their office and is in the nature of a public duty. Though it is not necessary that the person or authority under such statutory obligation be necessarily a public official or an official body (vide: Shri Schanlal v. Union of India and Another, A. I. R. 1957 SC 529). This principle was again affirmed by the Supreme Court in Praga Tools Corporation v. C. V. Manual and Ors., AIR 1969 SC 1306 where the Court ruled that there is neither statutory nor public duty imposed on the appellant-Corporation before the Supreme Court which was a non-statutory body incorporated under the Indian Companies Act, 1913. Shelat J. speaking for the Court held in that case as under :

> "It is, therefore, fairly clear that such a declaration can be issued against a person or an authority or a corporation where the impugned act is in violation of or contrary to a statute under which it is set up or governed or a public duty or responsibility imposed on such person, authority or body by such statute."

[7] It was, therefore, urged on behalf of the respondent-Corporation that the Court has no jurisdiction to issue a writ of mandamus against the respondent-Corporation which is a public limited Company incorpo rated under the Companies Act, 1956, and was, therefore, not a statutory body nor there is any public duty imposed or it under any statute. The preliminary objection is misconceived obviously for two reasons. In the first place, the relief which has been prayed for in this special civil app lication is for quashing and setting aside the impugned order of termination; inter alia, on the ground that it transgresses the mandate of Arts. 14 and 16 of the Constitution and, therefore, non est. In other words, the relief is for a writ or direction in the nature of certiorari. If the petitioner succeeds to make his challenge good against the impugred order it would amount to a situation as if it does not exist. The consequential direction about treating him as continuing in service as if the impugned order had not been made and to pay

him salary and accord him all other benefits retrospectively on that basis is a direction which will be well within the jurisdiction, power and authority of this Court under Art. 226 of the Constitution of India. This relief will not amount to a writ or a direction of or in the nature of a writ of mandamus stricto sensu because it is a command for securing the purpose of a public or a statutory duty. In Rohtas Industies Ltd. and Another v. Rohtas Industries Staff Union and Others, A I. R. 1976 SC 425, Krishna Iyer J., speaking for three Judges' Bench ruled that this extraordinary power of the High Court under Article 226 of the Constitution is as wide as the amplitude of the language used indicates and so can effect any person-even a private individual and be available for any (other) purpose even one for which another remedy may exist; though the Supreme Court has recommended to the High Courts in exercise of their extraordinary powers to practice self-restraint and not to travel beyond wholesome inhibitions except where the compulsion of the situation so requires in the interest of justice. In the second place, this Court will have jurisdiction to issue a writ of mandamus if the respondent-Corporation is held to be an agent of the State which is a real bone of the contention between the parties before me.

[8] I have, therefore, to decide whether the impugned order transgresses the mandate of Articles 14 and 16 of the Constitution, This contention will by necessary implication require me to decide whether the respondent-Corporation is an agent of the State. In Heavy Engineering Mazdoor Union v. State of Bihar and Ors. AIR 1970 SC 82, the respondent-Corporation was incorporated under the Companies Act, 1956 and with its entire share capital contributed by the Central Government was a Government Company within the meaning of sec. 617 of the said Act. The Memorandum and Articles of Association of the company conferred a large power on the central Government including power to give directions regardning the functioning of the Company. Ail the Directors on the Board were appointed by the President. Certain disputes having arisen between the Company and its workmen, the State of Bihar referred two questions to the Industrial Tribunal for its adjudication about the festival holidays as well for weekly off day. The appellant-Union challenged the validity of the said reference under Articles 226 and 227 of the Constitution before the High Court of Patna, inter alia, on the ground that the State Government was not the appropriate Government to make a reference, and it was the Central Government alone which could have referred the dispute for adjudication. On behalf of the Union, it was contended before the Supreme Court that the respondent-Company was an agent of the State. In context of that contention, the Supreme Court held as under :

"The question whether the corporation is an agent of the State must depend on the facts of each case. Where a statute setting up a corporation so provides such a corporation can easily be identified as the agent of the State as in Graham v. Public Works Commissioners 1902-1 KB 781 where Phillimore J. said that the Crown does in certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals, in the absence of a statutory provision, however, a commercial corporation acting on its own behalf even though it is controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a corporation and he is entitled to call for information, to give directions which are binding on the directors and to supervise over the conduct of the business of the Corporation does not render the Corporation an agent of the Government. (See State Trading Corporation of India Ltd. v. Commercial Tax Officer Visakhapatnam, 1964 (4) SCR 99 at p. 188= (AIR 1963 SC 1811 at p. 1849) per Shah J., and Tamlin v. Hannaford 1950-1 KB 18 at p. 25, 26). Such an inference that the Corporation is the agent of the Government may be drawn where it is performing in substance governmental and not commercial functions (CF: London County Territorial and Auxiliary Force Association v. Nichols 1948-2 All ER 432.)

[9] In State Trading Corporation of India's case (supra) two questions arose in writ petitions filed by the State Trading Corporation of India Ltd. against the State of Andhra Pradesh and State of Bihar, seeking to quash and set aside the orders of the Commercial Tax Officer of the State concerned, assessing the Corporation to sales-tax and also the notices of demand issued in pursuance thereof. Two questions, namely, whether the State Trading Corporation which was a Company registered under the Companies Act, 1956 was a citizen within the meaning of Article 19 of the Constitution so as to be competent to pray for the enforcement of fundamental rights guaranteed to citizens, and whether the State Trading Corporation was in substance a department and organ of the Government of India and, therefore, can claim to enforce fundamental rights against the State as defined in Article 12 of the Constitution arose. Sinha C. J., delivered the majority opinion on behalf of himself and his six brother Judges that the State Trading Corporation was not a citizen with the meaning of Article 19 and cannot

ask for enforcement of the fundamental rights granted to natural beings under Article 19 of the Constitution of India. In view of the answer to question No. 1, the majority Court did not attempt to answer question No. 2. However, Shah J., in his dessenting judgment considering the first part of the second question whether the State Trading Corporation was an agent or an organ of the State opined that it was essentially a question of fact. He emphasised the significant facts, namely, incorporation of the Corporation under the Companies Act and that it was not constituted under any special statute; functioning of the Corporation under the direct supervision of the Central Government; share holding in the name of the President of India and two Secretaries; entire contribution by the Central Government; nature of the functions being commercial and not governmental, and opined that it was not an organ or department of the State. He thereafter observed as under :

> "(115) The question whether the Corporation either sole or aggregate is an agent or servant of the State must depend upon the facts of each case. In the absence of any statutory provision a commercial corporation acting on its own behalf even if it is controlled wholly or partially by a Government Department, will be presumed not to be a servant or an agent of the State. The fact that a Minister appoints the members of the Corporation and is entitled to call for information and to supervise the conduct of the business does not make the Corporation an agent of the Government. Where, however, the Corporation is performing in substance govermental and not commercial functions, an inference that it is an agent of the Government may readily be made. " (emphasis supplied)

[10] In Halsbury's Laws of England, Fourth Edition, Vol. 9, in para 1210 (p. 721), the following principles are digested from the various decided cases in United Kingdom:

> "The question whether a corporation is a servant or agent of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over it in the performance of its duties. (See Bank Voor Handel an Scheepvaart NV v. Administrator of Hungarian Property (1954) 1 All. ER 969 at page 982 HL, per. Lord Reid). In the absence of any express statutory provision, the proper inference, at any rate in the case of a commercial corporation, is that it acts on its own behalf, even though it is controlled to some extent by a government department (Tamlin v. Hannaford (1949) 2 All. ER 327, C. A.). The fact that a minister of the Crown appoints the members

of such a Corporation, is entitled to require them to give him information and is entitled to give them directions of a general nature does not make the Corporation his agent (see Tamlin v. Hannaford-supia). The inference that a corporation acts on behalf of the Crown is more readily drawn where its functions are not commercial but are connected with matters, such as the defence of the realm, which are essentially the province of government (London County Territorial and Auxiliary Forces Association v. Nichols (1948) 2 All ER 432 at 434 C. A.)"

It should be noted that in all these decisions digested by Halsbury, the context was slightly different in which the question whether a particular Corporation was an agent of the Crown arose. The perspective was the immunities which the different Corporations claimed from certain statutory obligations. Mr. Nanavaty, therefore, urged that on the facts and in the circumstances of this case, the contention of the petitioner that the respondent-Corporation is an agent of the State is not at all warranted having regard to the constitution of the respondent-Corporation, exclusively commercial nature of functions discharged by it as opposed to the governmental functions and in absence of any statutory provisions conferring any special status to it. On the other hand, it was contended on behalf of the petitioner by Mr. Mehta that all Corporations acting as instrumentality or agency of the Government are subjected to the same limitations in the field of administrative law as Government itself even though the said Corporations may be distinct and independent legal entity and inasmuch as the respondent-Corporation was wholly controlled by the Government not only in the field of policy making but also in the field of the functions earmarked for it under the Memorandum and Articles of Association, it must be held to be an instrumentality or agency of the Government. In any case, he urged that having regard to the magnitude of financial assistance, the control of the management and the policies of the Corporation and the nature and functions carried out by the Corporation which closely relate to the governmental functions, the conclusion is inescapable that the respondent-Corporation is an agent of the State. Mr. Mehta, in support of his submissions, relied heavily on the decision of Supreme Court in Ramana Dayaram Shetty v. The International Airport Authority of India and Others, AIR 1969 SC 1628.

[11] It is in the context of these rival contentions that I have to consider whether the claim of the petitioner that the respondent-Corporation is an agent or instrumentality of the State is justified. It would be necessary to refer to the classic decision of the Supreme Court in International Airport Authority of India's case (supra) which is the latest in the field. No doubt, very important questions in the realm of administrative and constitutional law arose in that case. However, it would be profitable to bear in mind the background of the facts of that case. In that case, notice inviting tenders for putting up and running a second class restaurant and two snack bars at the International Airport at Bombay was issued by the International Airport Authority which is a corporate body constituted under a special statute. Tenders were to be submitted by a certain date, namely, January 25, 1977. The qualification prescribed as to who could quote the tenders was to the effect that the persons must be registered second class Hoteliers having at least 5 years' experience for putting up and running a Ilnd class Restaurant and two snack bars. The only valid tender was from Cafe Mahim, Central Catering Service which was the 4th respondent. Their covering letter disclosed that they had experience only of running canteens and not restaurants, and they were not registered Ilnd Class Hoteliers having at least 5 years'experience as prescribed in the notice. In the course of correspondence that ensued between the parties, 4th respondent asserted that they had experience equivalent to that of Ilnd Class or even 1st Class Hoteliers. The Airport Authority, therefore, accepted their tender on certain conditions prescribed in the letter of acceptance. Cafe Excelsior who had not quoted the tender challenged this action of the Airport Authority on the ground that it was violative of Art. 14 of the Constitution inasmuch as it denied equal treatment to all persons who are similarly situate not having the prescribed qualifications and, therefore, could not quote tenders in response to the notice of the Airport authority, first, by way of a regular suit and when it failed to obtain interim relief, moved the High Court of Bombay challenging the decision to accept the tender of the 4th respondent which was summarily rejected by the learned Single Judge. Appeal against the said order was also rejected by a Division Bench of the Bombay High Court with the result that he was required to carry the matter in appeal to the Supreme Court. The main contention urged before the Supreme Court was that inasmuch as the airport authority was a State within the meaning of Art. 12 of the Constitution, or, in any event, a public authority, it was bound to see that the conditions of eligibility prescribed by it was satisfied by all the tenderers and it cannot depart from the prescribed conditions at its own sweet will without rational justification since that would amount to denying equal opportunity to persons similarly situate. It is in

this context that Bhagwati J., speaking for the Court reviewed the entire relevant case law on the point. In that process, he first referred to the decisions of the Supreme Court in A. S. Ahluwalia v. State of Punjab, AIR 1975 SC 984 and Sukhdev v. Bhagatranr, AIR 1975 SC 1331, where the Supreme Court referred with approval to the decision of Justice Frankfurter in Vitarelli v. Seaton (1959) 359 US 535: 3L Ed 2d 1012 that an executive agency must be rigorously held to the standards by which it professes its action to be judged. This rule in the opinion of Supreme Court in judicially evolved de hors Art. 14 as a wholesome check against the exercise of arbitrary power by executive authority and it has become more relevant in the present context of 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. Bhagwati J., then proceeded to observe that the Government which represents the executive authority of the State acts through the instrumentality or agency of judicial persons also to discharge its functions. The instrumentality of the civil service was found to be inadequate in coping with the multifarious activities of the modern State and, therefore, public corporations came into being as "the third arm of the Government". The opinion of Mathew J, in Sukhdev's case (supra) that such federal corporations would ex-hypothesi be agencies of the Government was referred with approval. Bhagwati J. referred to the industrial policy resolution of the Government of India in pursuance of which corporations were created for management of public enterprises and carrying out other public functions which otherwise could have been managed by the Government departmentally. It was, therefore, held by the Supreme Court as under:

> "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 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."

> Bhagwati J. thereafter proceeded to answer the crucial question as to how to determine whether the corporation was acting as instrumentality or agency of the Government which was fraught with some difficulty. A corporation can be created under a statute or by incorporation under the relevant law such

as Companies Act. It would be profitable for me to reproduce in terms certain broad tests indicated by the Supreme Court in deciding whether a Corporation is an agent of the State or not. According to Mr. Mehta, the learned Advocate for the petitioner, the Supreme Court has visualized two broad categories of corporations-whether statutory or non-statutory. In the first category those corporations are included where they are wholly controlled by the Government not only in their policy making but also in the functions entrusted to them by the law establishing them or charter of their incorporation. The second category comprises of those autonomous corporations-statutory or non-statutory-subject to any directions that may be issued from time to time by the Government in respect of policy matters only. Mr. Mehta submitted that in respect of former category of corporations, the Supreme Court has ruled that there is no doubt that they would be instrumentality or agency of the Government. It is only in respect of the second category that the Court has to apply the tests which have been indicated by the Supreme Court in its judgment. I would, therefore, examine whether Mr. Mehta is right in this contention.

[12] This is what Jastice Bhagwati has said in paragraph 14 after raising the question as to how to determine whether the corporation is acting as an instrumentality or agency of the Government:

"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 if by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working subject only to a provision often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of directors or committee of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the

entire share capital of the corporation by Government enough or is it necessary that in addition, there should be a certain amout of direct control exercised by Government and, if so, what should be the nature of such control?

[13] Mr. Mehta's contention does not appear to be well-founded as the various factors discussed by the Supreme Court in the latter part of the judgment clearly indicate otherwise. The paragraph extracted above does indicate that if a Corporation is wholly controlled by the Govern ment not only in the policy matters but also in its day-to-day functions, it can be readily inferred that it is an instrumentality or an agency of the Government. However, if that had been the straight jacket formula, the Court would not have discussed as it did in the later part of the Judgment while examining the facts of the case the other lists evolved by it in the socalled second category of the Corporations. The question so far as this category of corporations is concerned, appears to be simple one, though it may not be safe to go by such simple test. It is in cases of corporations - statutory or non-statutory - which have subjected them selves to the directions being given by the Government from time to time in the policy matters that the inference is not readily drawn and further considerations would arise as to what is the contribution, nature of con trol, nature of functions to determine whether they are agents of the State Even in the latter category of corporations, namely, those the policy decisions of which are subjected to the Government's directions, the Supreme Court has ruled that if the entire share capital is held by the Go vernment, it may go a long way towards indicating that it is an instrumentality or agency of the Government. I am not concerned here in the present petition with a Corporation established by a statute having no share capital where a further test may be required to be applied as to whether the directors are Government nominees and how far they are free to take decisions in policy matters or day-to-day functions. The broad tests of the quantum of assistance, nature of functions, nature of control etc. have been elucidated by Bhagwati J. and he has expressed the opinion of the Court that the analogy of the concept of State action as developed in United States is not altogether out of place in this country while considering the question. The trend of decisions in United States that if a private Company is supported by extraordinary assistance by the State, it may be subject to same constitutional limitations as the State itself. If, therefore, extensive and unusual financial assistance is rendered by the Government with a view to enable the Company to use for purposes which are of public nature, the fact of assistance becomes a very relevant circumstance justifying an inference that the Company is an agent of the State.

The Supreme Court, therefore, observed as under :

" It may, therefore, be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character "

The Supreme Court relied on its earlier decision in Sukhdev 's case (supra) where it was held:

"...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. "

The existence of deep and pervasive State control and monopoly status of Corporations are also indicative of the Company being an instrumentality or agency of the State. The public nature of the functions discharged by the Company may also indicate whether the company is an agent or instrumentality of the State, since compulsions of economy may enjoin a State to operate a multitude of public enterprises and discharge a host of other public functions besides the socalled classic functions. The Supreme Court, therefore, said as under:

".. 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. "

In support of this opinion, the Supreme Court relied on the judgment of Mathew J. in Sukhdev's case (supra) where it was said: -

" 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. "

The Supreme Court also referred in this connection to the decision of the United States Supreme Court in Marsh v. Alabama (1945) 326 US 501: 90 L, Ed 265, where the Supreme Court applied the public nature of functions as a principal test for holding that a Corporation which owned a company town was subject to the same constitutional limitations as the State. However, Courts must be weary in application of this test since it does not invariably lead to the correct inference and merely because an activity may be such as may be ordinarily carried on by the Government, it cannot be readily inferred that the Company which is a private entity would be an instrumentality or an agency of the Government by reason of carrying on such an activity. Bhagwati J., therefore referred to that opt quoted dictum in Sukhdev's case (supra) that the contract is rather between governmental activities which are private and private activities whic are governmental. The Supreme Court, therefore, said in this connection as under:

".....But the public nature of the function, if impregnated with governmental character of 'tied or entwined with Government' or fortified by some other additional factory, 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 suportive of this inference."

The Supreme Court, therefore, summed up the position in the following words :

"It will thus be seen that there are several factors which may have to be considered in determining whether a corporation is an agency or instrumentality of Government. We have referred to some of these factors, and they may be summarised as under : whether there is any financial assistance given by the State, and if so, what is the magnitude of such assistance whether there is any other form of assistance, given by the state, and is so, whether it is of the usual kind or it is extraordinary, whether there is any control of the management and policies of the corporation enjoys State and what is the nature and extent of such control, whether the functions carried on out by the corporation are public functions closely

related to governmental function. This particularisation of relevant factors is however not exhaustive and by its vary nature is cannot be because with increasing assumption of new take, growing complexities of management and administration and the necessity of continuing adjustment in relations between the corporation and Government calling for flexibility adaptabilityand innovative skills, it is not possible to make an exhaustive enumeration of the tasts which would invariably and in all cases provide an unfailing answer to the question whether a corporation is governmental instrumentality or agency. Moreover, even amongst these factors which we have described, no one single factor will yield a satisfactory answer to the question and the Court will have to consider the cumulative effect of these various factors and arrive at its decision on the basis of particularised inquiry into the facts and circumstances of each case. "The depositive question in any State action case", as pointed out by Doughles J. in Jackson v. Metropolitan Edison Co., 91974-419 US 345) (supra) is not whether any single fact or relationship presents a sufficient degree of State involvement, but rather whether the aggregate of all relevant factors compels a finding of State responsibility ".....It is the aggregate or cumlative effect of all the relevant factors that is controlling."

[14] It is in this context of settled legal principles that I have to decide whether the present respondent-Corporation before me in is an instrumentality or an agency of the State. The admitted position which emerges from the affidavits of the parties before me about the extent of assistance rendered to the respondent-Corporation, the degree of control exercised over the policy matters and day-to-day functions of the Corporation and the nature of the functions discharge by it is under :

(1) The respondent-Corporation is a Government Company within the terms of sec. 631 of the Compaies Act, 1956.

(2) The year-wise subscription by the State to the share-capital is as under :

Year No. of shares Value Percentage. 1962 5970 Rs. 5,97,000 40% 1963 30 Rs. 3,000 1971 6000 Rs. 6,00,000 1973 19000 Rs. 19, 00, 000 58% 1975 6860 Rs. 6, 86, 000 63% 1977 1075 Rs. 1,07,500 64. 90%

(The respondent-Corporation became Government Company on April 4,

1973 when Government subscribed 19000 shares.)

(3) Out of the issued, subscribed and paid up capital of Rs. 60, 00, 000/- comprising of 60000 shares of Rs. 100/-each, the State Government has subscribed 38935 shares of the total value of Rs. 38, 93, 500 as on 31st December, 1977. In other words, the State Government has contributed 64 90% of the share capital.

(4) The secured loans on cash credit account from the Banks as on 31st December, 1977 was to the tune of Rs. 2, 00, 00, 000/- (Rs. 2 crores) and on deferred payment credit about Rs. 9, 00, 000/-(Rs. 9 lacs) from the Bank. The unsecured loan from the Gov ernment of Gujarat - both long term and short term - was to the tune of Rs. 3, 00, 00, 000/- (Rs. 3 crores) besides the fixed deposit from the Government of Gujarat to the tune of Rs. 17, 00, 000/- . (Rs. 17 lacs).

(5) The degree of control by the State Government over the respon dent-Corporation was a deep and pervasive -

(a) in its policy making as well as in the day to day functions entrusted to it by the Charter of its incorporation since it is prescribed in Clause 68 of the Articles of Association as under:

"68. Notwithstanding anything contained in any of these Articles, subject to the provisions of the Act the Governor of Gujarat may, from time to time, issue such directions or instructions as he may consider necessary in regard to the affairs or the conduct of the business of the company or the Directors thereof and in like manner may vary and annul such directions or instructions. The Directors shall duly comply with and give immediate effect to the directions and instructions so issued, subject to the provision of the Act. (emphasis supplied)

(b) in the Board of Directors l/3rd of the total number of directors is nominated by the State Government.

(c) the majority of the remaining directors to be elected by the shareholders would be virtually the nominees of the State Government since the State Government is holding 65% of the share capital.

(d) the 1/3 State nominees on the Board are permanent direc tors in the sense they are not liable to retire by rotation nor they could be removed by a resolution of the general meeting.

(e) the Managing Director is to be appointed by the State Government and his term and remuneration as fixed by the Government shall constitute and be binding as a contract between him and the Company.

(6) The public nature of the functions of the respondent-Corporation is amply manifested from the various objects of the Company prescribed in clause III of the Memorandum of Association. The material objects relevant for the present discussion are prescribed in the relevant sub-clauses, namely (1), (2), (2B), (2E), (2F), (3), (4), (5), (6), (8), (9), and (10). Broadly stated, the nature of functions is protection, promotion, guidance and assistance to the small scale industry in general or any company or companies, syndicate or other concerns in particular furtherance of the cause of small scale industry in the State. The particular functions assigned to the respondent-Corporation are: -(i) to carry on any manufacturing activity;

(ii) to recommend, grant or guarantee loans or advances to small industries to enable them to carry on the manufacturing activities; (iii) to precure coke and coal and arrange for distribution among industries:

(iv)to effect co-ordination between large and medium industries and small industries by suitable methods enabling small industries to manufacture satisfactorily upto the standard such parts, accessories, ancillaries and components and other articles as may be required by large and medium industries;

(v) to establish, develope and manage industrial estates;

(vi)to provide facilities of water supply, drainage, power factory buildings, warehouses, roads, railway, sidings, testing facilities, repairs and mainte nance and common facilities, quality marking etc

[15] The aforesaid facts and circumstances as emerging from the affidavits, the balance sheet and Articles and Memorandum of Association of the respondent-Corporation clearly indicate, in my opinion, that the respondent-Corporation is an agent or instrumentality of the State Government of Gujarat. The obvious reason for my conclusion is, apart from the extent of financial assistance and the degree of control of the State over the respondent-Corporation, the governmental functions of the Industry Department of promotion, protection and assistance of small scale industry is completely transferred to the respondent-Corporation. The public nature of the functions of the respondent-Corporation as enumerated above is impregnated with the governmental character, or, in any case, "tied or entwined with Government" so as to render the respondent-Corporation an instrumentality or agency of the State Government. The objects of recommending guarantee and grant of loans and advances to small industrial units and procurement of important raw materials like coke and coal and arrangement for the distribution thereof among industries as prescribed in clauses (28) and (4) establishment, development and management of industrial estates and providing for civic facilities like electric supply, railway sidings and warehouses are classical governmental functions, or in any case, they are in the nature of governmental functions and, therefore, impregnated with the governmental character which rendered the respondent-Corporation an agent of the State. Besides this public nature of the functions having governmental character, the degree of control which is so deep and pervasive as to empower the State Government to issue directions or instructions of binding nature not only in the conduct of the business of the Company or the Directors, but also in the affairs thereof and thus clearly circumscribe the policy making or routine day-to-day management by the Directors of the Company who are obliged by clause 68 to comply with and give immediate effect to such directions and instructions. The State Government also weilds effective control over the policy making and day-to-day management by the Directors of the business and affairs of the Company by appointing l/3rd number of directors on the Board as its nominees who are not liable to retire by rotation or be removed by the Company. Coupled with this power contained in clause 70

of the Articles of Association, the State Government will have a majority in the remaining directors to be elected by the shareholders since it holds 65% of the issued and subscribed share capital. The Managing Director is a State nominee who has not to depend for his term or remuneration on the decision of the Board of Directors. The extent of the financial assistance is more than substantial. Not only 65% of the share capital is subscribed by the State Government, it has advanced a long term loan of about Rs. 2, 00, 00, 000/-(two crores) and a short term loan of about Rs 1, 00, 00, 000/- (Rs. one crore) aggregating to Rs. 3, 00, 00, 000/- besides Rs. 20, 00, 000 by way of fixed deposit. I am of the opinion that none of the tests suggested by the Supreme Court in International Airport Authority of India's case (supra) remains unsatisfied. The substantial extent of financial assistance, the deep and pervasive State control, the majority of the directors on the Board being the State nominees or State electees and the public nature of the functions of governmental character, in my opinion, rendered this respondent-Corporation as an instrumentality or agency of the State.

[16] Mr. Nanavaty however attempted to persuade me that having regard to the promotion, incorporation and the nature of the objects of the respondent-Corporation, it cannot be urged successfully that the respondent-Corporation is an instrumentality or an agency of the State and unless a Company incorporated under the Companies Act carries on Governmental functions in the strict sense of term, it cannot be deemed to be an agency or instrumentality of the State. The Company was promoted by 9 subscribers out of whom 7 were private businessmen or industrialists and only 2 were Government officers. The State Government held only 40% of shares when the Company was incorporated under the Companies Act, 1956. The main object for promoting the Company is to carry on manufacturing activities which were manufacturing scooters under the first phase thereof. The majority of the directors namely 2/3rd was to be elected by the shareholders. Out of 1130 share-holders on the register of shareholders as many as 1086 are members of public. The institutional Governmental membership is about 43. The respondent-Corporation has raised loans from the nationalised banks which is to the tune of Rs. 2,00,00,000/-. Merely because the Government has power to issue directions or to appoint Managing Director cannot convert this company into an instrumentality or agency of the State. In support of his contention he relied on three decisions of the Supreme Court in Praga Tools Corporation's case (supra); Heavy Engineering Mazdocr's case (supra) and Agarwal v. Hind ustan Steel Ltd., AIR 1970 SC 1150. He also relied on the decisions of Patna, Calcutta and Andhra Pradesh High Courts in R. D. Singh v. Secretary Bihar Stale Small Industries (1975) 45 Company Cases 527; Ranjit Kumar Chalterjee v. Union of India and Others (1969) 39 Company

Cases 327 and J. Ganapathy and Others v. Managing Director, Nellore Co-op. Spg. Mills Ltd. (1979) 1 LLJ 364. I am afraid the contention of Mr. Nanavati as too broad to be accepted. The decisions of Patna, Calcutta and Andhra Pradesh High Courts cannot be of much assistance to the cause of Mr. Nanavati since in the ultimate analysis they relied on the aforesaid three decisions of the Supreme Court. The question in Praga Tools Corporation's case; Heavy Engineering Mazdoor Union's case and Agarwal v. Hindustan Steel Ltd. t (supra) had a different context and, therefore, those decisions cannot be pressed into service as authorities on the question with which I am concerned here in the present petition. The decision in Praga Tools Corporation and Heavy Engineering Mazdoor Union's cases (supra) have been clearly distinguished by the Supreme Court in the International Airport Authority's case (supra) Mr. Nanavati, therefore, relied on the decision of the learned Single, Judge of this Court (D. A. Desai J-as he then was) in Special Civil Application No. 962 of 1975 decided on June 23, 1975 where by a speaking order Desai J. summarily rejected a petition preferred by an Assistant against his order of reversion made by the Managing Director of this very respondent-Corporation following the decisions of the Supreme Court in Sukhdev 's case (supra) and Rajasthan Stale Electricity Board, Jaipur v. Mohanlal, AIR 1967 SC 1857 on the ground that the respondent-Corporation is not a State. I have not been able to appreciate how this decision of the learned Single Judge can advance the cause of the respondent-Corporation when the question whether it is an agency or instrumentality of the State was not canvassed at all before him and more particularly now with the proper perspective given to the question by the latest decision of the Supreme Court in International Airport Authority's case (supra) the benefit of which was not available to the learned Single Judge at that time. In that view of the matter, therefore, I am of the opinion that the respondent-Corporation is an instrumentality and agency of the State and as such subjected to the same limitations in the field of constitutional and administrative law as State itself, and, therefore, bound by the mandate of Articles 14 and 16 of the Constitution of India.

[17] The impugned order of termination is clearly arbitrary inasmuch as it does not assign any reasons nor any reasons have been furnished to this Court in the affidavit-in-reply filed on behalf of the respondent-Corporation for removal of the petitioner from the service, and more particularly when it has been effected by the impugned order within less than two months after the confirmation of the petitioner on such a position as an Assistant Manager (works) where he earned two increments. In any case, the power of termination cannot be pressed purely on the basis of contract of service and could not be justified as unfettered right to hire and fire its employees unless the employee has

lost confidence or betrayed the turst of the employer or for exigencies of service. A division Bench of this Court in its decision in Second Appeal No. 297/77 with Second Appeal No. 352/77 decided on October 1, 1979 (Amarsingh S. Medalia v. Guj. S. R. T. Corp. XXI G, L. R. 500) where the two employees of the Gujarat State Road Transport Corporation had been removed from the service purporting to act under the power of termination simpliciter under the Regulations, held that such a power cannot be exercised at the sweet will of the Competent Authority and it is expected of such senior officers exercising such a wide power of termination of services and particularly of a permanent employee which has far reaching consequences not only for that particular employee against whom action is taken but his family that the over all considerations of public interest and exigencies of service should weigh with them. In my opinion, therefore, the impugned order of termination is arbitrary and, therefore, violative of Articles 14 and 16 of the Constitution and more so because no case has been made out that the petitioner had betrayed the trust or that there was a loss of confidence or for exigencies of service. The impugned order cannot be claimed to be innocuous one notwithstanding its outward format because the petitioner was removed from the service within two months after his confirmation in a senior position as Assistant Manager (works) where he earned two increments as clearly admitted by the respondent-Corporation. In the circumstances, therefore, I must uphold contentions Nos. 1 and 3 urged on behalf of the petitioner and, therefore, contention No. 2 is not required to be decided.

[18] The result is that this petition is allowed and the impugned order of removal should be quashed and set aside. A declaration is granted that the petitioner continues in service of the respondent-Corporation as Assistant Manager (works) in the grade in which he was at the time of his removal as if the impugned order has not been made, and consequently, therefore, the respondent-Corporation is directed to pay all the back wages upto date and grant him all the benefits to which he would be entitled if the impugned order had not been made. Rule is made absolute accordingly with costs.

Petition allowed.