SUPREME COURT OF INDIA

Jatya Pal Singh

Vs.

Union of India

C.A.No.2147 of 2010

(Surinder Singh Nijjar and Anil R. Dave JJ.)

17.04.2013

JUDGMENT

SURINDER SINGH NIJJAR,J.

1. Leave granted in SLP© No.4619 of 2011.

2. This judgment will dispose of a group of appeals, details of which are given hereunder, as they raise only one question of law:

Proceedings before the Bombay High Court:-

3. Writ Petition No.2139 of 2007 titled as Mahant Pal Singh vs. Union of India dismissed in limine by the Division Bench on 7th September, 2009. Civil Appeal No.3933 of 2013 @ Special Leave Petition (C) No.4619 of 2011 titled as M.P.Singh vs. Union of India Ors. has been filed challenging the aforesaid order of the Division Bench. Writ Petition No.2652 of 2007 titled as Jatya Pal Singh Ors. vs. Union of India Ors. was dismissed in limine by the Division Bench on 8th September, 2009 in view of the order dated 7th September, 2009 passed in Writ Petition No.2139 of 2007. The aforesaid order has been impugned by the appellants (writ petitioners in the High Court) Jatya Pal Singh Ors. vs. Union of India Ors. in C.A.No.2147 of 2010.

Proceedings in the Delhi High Court :-

4. Ten writ petitions were filed by the former employees of the Videsh Sanchar Nigam Limited (VSNL). The common question of law raised in all the appeals

relates to the very maintainability of the writ petitions. VSNL had raised a preliminary objection that a writ petition would not be maintainable against it as it is neither a State within the meaning of Article 12 of the Constitution of India nor is it performing any public function. The learned Single Judge accepted the aforesaid preliminary objection and dismissed the writ petitions by judgment and order dated 29th August, 2011. Letters Patent Appeal No.924 of 2011 challenging the aforesaid order was dismissed by the Division Bench on 14th November, 2011. LPA Nos. 930 of 2011 and 931 of 2011 were dismissed by the common order dated 15th November, 2011.

4A. Only two of the original writ appellants have approached this Court in the civil appeals against the judgment of the learned Single Judge and the Division Bench of the Delhi High Court by way of civil appeals. These are Ram Prakash vs. Union of India Ors. in C.A.No.5740 of 2012 and Vijay Thakur vs. V.S.N.L. and Anr. in C.A.No.425 of 2012.

5. For the purpose of this order, we shall make a reference to the facts as pleaded in C.A.No.2147 of 2010. All the appellants in writ petitions had been working in the Ministry of Communication, in particular, Department of Overseas Communication Service (OCS) from 1st March, 1971 onwards. Their dates of appointment on various posts are as under :

6. Appellant Nos. 1 and 2 were appointed as Assistant Engineer on 16th May 1983 and 1st September, 1983, respectively. Appellant Nos. 3 and 4 were appointed as Junior Technical Assistant on 1st March, 1971 and 13th January, 1976 and appellants 5 and 6 were appointed on 8th January, 1980. During their continuous service with respondent No.1, they had earned promotions at due time on merit. They have a clean record of service. Till 31st March, 1986, they were holding responsible posts in the OCS.

Background of VSNL:

A) Origin of Overseas Communication Service (in short OCS) -

7. On 1st of January, 1947 ‘Indian Radio and Telecommunication company Ltd.’ a Private Company operating India’s external telecommunication service was taken over by the Govt. along with its employees on the terms and conditions as they had with the private company.

8. The Govt. created a department in ministry of telecommunication known as Overseas Communication Service (OCS) that dealt communication of India subjects with the rest of the world.

9. The OCS department of Ministry of telecommunication continued till 31st of March, 1986.

B) Conversion of OCS into VSNL -

10. Ministry of Communication took a decision to convert its OCS Department into a Public Sector Corporation (PSC). A notification to this effect was issued on 19th March, 1986 and the Corporation was named as VSNL. Accordingly, w.e.f. 1st April, 1986, all international telecommunication services of the country handled by the Govt. stood transferred to VSNL. All the employees were deemed to have been transferred to the VSNL on the existing terms and conditions till their case for absorption or otherwise are decided upon by the VSNL in consultation with the cadre controlling authority and other concerned Govt. Departments. They were to be treated on deputation on Foreign Service to VSNL without deputation allowance. These employees also were to be treated as though on the strength of OCS as on 31st March, 1986 till their cases were finalized by the VSNL. Those who do not opt for absorption will be treated as on deputation on foreign service with the Corporation for a period of 2 years without deputation allowance. The Corporation (VSNL) would finalise the terms and conditions for employment in the Corporation within a period of 12 months or on any specified date as may be agreed upon by the Government. It was provided that the employees will be asked to exercise their option for being absorbed in the company or otherwise within the stipulated period. The date of induction of the employees in the Corporation will be the date from which they have exercised the option to be absorbed in the Company with the approval of the competent authority. The notification also provided that pensionary and other retirement benefits to the employees on their absorption in the Corporation will be determined in accordance with the Department of Pensions and Pensioners Welfare O.M. No.4(8)-85-P PW dated 13th January, 1986 and as amended from time to time.

11. Thereafter on 11th December, 1989, VSNL issued STAFF NOTICE on the subject ‘Absorption of OCS Employees in VSNL’. In this notice, it is mentioned that date of absorption of OCS employees in the VSNL has been approved by the Ministry of Communication on 1st January, 1990. It is further mentioned that accordingly from that date, the OCS employees transferred to VSNL on deputation basis without deputation allowance on foreign service terms will cease to be

government servants. The aforesaid notice of absorption including the terms and conditions of absorption was also issued individually to each employee. On 5th July, 1989, the Government had issued Office Memorandum No.4/18/87-PPW (D) on the subject 'Settlement of Pensionary terms etc. in respect of Government employees transferred en masse to Central Public Sector Undertakings/Central Autonomous Bodies'. Under this, the employees were given the option to retain the pensionary benefits available to them under the Government rules or be governed by the rules of the Public Sector Undertaking/Autonomous Bodies. The Government also assured that the employees of the OCS will not be removed by the VSNL unless their case was placed before the competent authority in the Government. Finally, the VSNL absorbed en- masse the erstwhile employees of OCS with effect from 1st January, 1990. The solemn promise of not being removed was incorporated in the Conduct Discipline and Appeal Rules framed by the VSNL in the year 1992. It is pertinent to note here that all the appellants had opted to join VSNL.

C. Disinvestment

12. Between 1992 and 2000, Government of India divested a portion of its share holding in VSNL by sale of equity to certain funds, banks and financial institutions controlled by the Government in 1992 and to the general public in 1999. Thereafter, the company was listed on Indian Stock Exchange. In 1997, the Government of India sold some of its equity holdings by issuing Global Depository Receipts (GDRs) following which VSNL was listed on the London Stock Exchange. On 15th August, 2000, VSNL became first Public Sector Undertaking of India to be listed on the New York Stock Exchange through conversion of underlying GDRs to American Depository Receipts (ADRs). However on 13th February, 2002, Government of India which till then held 52.97% of shares in VSNL, divested 25% shares in favour of Panatone Finvest Limited, (comprising of 4 companies of the Tata Group) and 1.85% in favour of its employees after following due process in accordance with its disinvestment policy. This brought the share holding of the Government of India to 26.12 %. Tata Group also made a public offer for acquiring a further 20% of the share capital of the VSNL, from the public in terms of SEBI (Substantial Acquisition of Share and Takeover) Regulations 1997. Consequently, the total holding of the Tata Group in VSNL increased to 44.99 % of the paid up share capital in 2002. Presently, Tata Group holdings in VSNL is about 50.11%.

13. As per the share holding agreement and share purchase agreement, the Government of India mandated the Tata Group to ensure that none of the

employees should be retrenched for a period of one year. Clause 5.13 of the aforesaid agreement was as under:-

> "5.13 Employees.
>
> (a) Notwithstanding anything to the contrary in this Agreement, the Strategic Partner shall not cause the Company to retrench any of the employees of the Company for a period of 1 (one) year from the closing other than any dismissal or termination of employees of the company from their employment in accordance with the applicable staff regulations and standing orders of the Company or applicable law."

14. It appears that the Tata Group by a letter dated 14th April, 2002 to ensure that the morale of the present employees of the VSNL is maintained at a high level and that they continue to deliver their best performance, decided that it shall cause VSNL not to retrench any of the employees of VSNL for a period of two years from 13th February, 2002.

15. On 5th February, 2004, VSNL was granted a non exclusive licence by the Government of India pursuant to the disinvestment. Clause (1) of the non exclusive licence reads as under :-

> "1. In view of the fact that the LICENSEE is the INCUMBENT OPERATOR and in consideration of the payments including LICENCE FEE and due performance of all the terms and conditions mentioned in the SCHEDULE on the part of the LICENSEE, the Licensor does, hereby grant, under Section 4 of the Indian Telegraph Act, 1885, on a non-exclusive basis, this Licence to establish, install, operate and maintain INTERNATIONAL LONG DISTANCE SERVICE on the terms and conditions contained in the SCHEDULE and ANNEXURES appended to this LICENCE AGREEMENT." (emphasis added)

16. Prior to disinvestment, VSNL enjoyed the monopoly in respect of international long distance service (ILDS), which ceased with effect from 5th February, 2004. Thereafter other telecom licensees like Reliance, Airtel, Idea, Aircel, HFCL and even Government companies like MTNL and BSNL became competitors in respect of ILDS.

17. It appears that on 16th July, 2007 and 4th October, 2007, the services of 20 managerial employees were terminated after paying them 3 months' salary in lieu

of notice. The aforesaid termination was said to have been effected in terms of Clause 1.6 of the appointment letter which reads as under :

> "1.6 After confirmation, your appointment may be terminated by either side at any time by giving three months notice in writing. VSNL however, reserve the right of terminating your services forthwith or before expiry of the stipulated period of notice of 3 months by making payment to you of a sum equivalent to the pay and allowances for the period of notice or unexpired portion thereof. The decision of the management shall not be question."

18. The orders of termination issued to the aforesaid 20 employees were identical. Meanwhile on 28th January, 2008, subsequent to the disinvestment in 2002, the name of VSNL being a Tata Group Company was changed to "Tata Communications Limited". Ten writ petitions were filed by the employees before the Delhi High Court and 2 writ petitions were filed before the Bombay High Court challenging the orders of termination. On 29th August, 2011, learned Single Judge of the Delhi High Court vide common order dismissed the 10 writ petitions, as not maintainable against TCL, the reconstituted entity of VSNL after disinvestment. The aforesaid order was challenged by four of the writ appellants in LPA which was dismissed by separate orders on 14th November, 2011, 15th November, 2011 and 17th February, 2012. Out of the said four persons Ram Prakash and Vijay Thakur have filed Civil Appeal No.5740 of 2012 and Civil Appeal No. 425 of 2012 before this Court.

19. As noticed earlier, Division Bench of the Bombay High Court also dismissed the writ petitions by order dated 7th September, 2009 and 8th September, 2009 against which the appellant herein have filed Special Leave Petition (C) No. 4619 of 2011 and Civil Appeal No. 2147 of 2010.

Submissions:

20. We have heard the learned counsel for the parties.

21. Mr. T.N. Razdan, learned counsel for the appellants has submitted that VSNL cannot be said to have become an absolute private entity after Union of India sold its 25% shares out of 52.97% to Panatone Finvest Ltd. Union of India still holds 26.97% shares in VSNL. Other Government Companies hold 17.35 % shares in VSNL. Therefore, VSNL cannot be said to be not amenable to the writ jurisdiction. Furthermore, VSNL is under the complete control of Telecom Regulatory

Authority of India (TRAI) Act, 1997 and the Telegraph Act, 1948. Therefore, the writ petition would lie in cases where the services of the employees were terminated in breach of the rules governing the service conditions of the employees. Referring to the share holding pattern in VSNL, it is claimed that Union of India is the single large shareholder holding 26.12% shares in VSNL. It is further the case of the appellant that Panatone Finvest Ltd. having stepped into the shoes of erstwhile shareholder and is bound by the commitments and obligations, rights and liabilities arising from the sale/purchase of shares.

22. Dr. K.S. Chauhan, learned counsel, also reiterated the aforesaid submissions. In addition, he submitted that Central Government still has pervasive control over the VSNL/TCL. The strategic partner i.e. Panatone Finvest Limited/TATAs have been bound by the Government agreement in relation to divestment of the 25% stakes, and there is a further condition that if the strategic partner wish to sell its stakes in the VSNL/TCL, it is not free for the strategic partner to sell off the same in the open market, but the shares can be sold off back to the Government only. It clearly, according to learned counsel, buttresses the fact that the Government consider the function/activity so sacrosanct and of such public importance that it does not wish to alter the nature of the functions of VSNL/TCL. However, there is no such condition precedent in the agreement with the other telecommunication companies which are merely service providers. Thus, both the learned counsel have reiterated the submission that VSNL would be covered by the term "other authority" within the scope and ambit of Article 12.

Nature of the Functions performed by the VSNL:-

23. According to Mr. Razdan, the right to communication is a facet of freedom of speech and expression under Article 19(1) (a) of the Constitution of India. The Government of India is duty bound to provide uninterrupted Telecommunication Services to enable its citizen to effectively exercise the aforesaid right. This public duty was being provided through one of the departments i.e. Department of Telecommunication, in particular, the OCS. The same function was subsequently performed by the VSNL, a wholly owned government enterprises, till disinvestment. Even after disinvestment, VSNL continues to perform the same functions by connecting its subscribers to their receivers in India as well as abroad. VSNL performs the aforesaid functions under license in terms of Section 4 of Indian Telegraph Act, 1948. Being the licensee, VSNL is under the control of TRAI for all its activities of ILDS. After disinvestment, VSNL has spread its ILDS activities to 52 locations and has increased the strength of its employees from 3000 to 7000. It has been located in prime areas in all the cities like Delhi, Pune, and

Kolkata. The aforesaid land belongs to Union of India and is in the possession of VSNL. Union of India is the licensor of all the lands, assets, equipment machine and tools under the license of VSNL. Land belonging to Union of India is worth lakhs of crores of rupees. In the face of this, the High Court would not have concluded that Government of India has no control over the activities of VSNL.

24. This submission was also reiterated by Dr. K.S. Chauhan, learned counsel. Dr. Chauhan, in addition to the aforesaid arguments, submitted that Respondents herein have monopoly over the international communication, as VSNL/TCL is the gateway of the world. VSNL can communicate worldwide for India which facility is not available to any other communication company. Companies, such as Vodafone etc., are only transferring speech whereas VSNL is providing value added service. It provides EMER Set service to Defence Forces including Merchant Navy. VSNL/TCL is specially catering to the requirement of the President and Prime Minister of India for preparation of hotline, etc. Further, learned counsel submitted that even a private function which is performed for public benefit would be a public function. He submitted that in the case of Delhi Science Forum vs. Union of India[1] that telecommunication has been internationally recognized as a public utility of strategic importance. Therefore, it cannot be said that VSNL is not performing public functions.

25. The High Court, it was submitted, was unduly influenced by the fact that the VSNL does not enjoy a monopolistic character. Further more, it was wrongly held that services provided by other telecom operators are no different to the service provided by VSNL. Mr. Razdan further submitted that the High Court has failed to distinguish the expression ‘other authority’ as defined in Article 12 of the Constitution of India from that of ‘any person or authority’ in Article 226 of the Constitution. In fact, the High Court totally ignored the submission that the definition of other authority would now have to be seen by taking into account the mixed economy of State and the private enterprises. The High Court, however, confined itself only to the issue as to whether VSNL after disinvestment is State within Article 12 of the Constitution. He submitted that it is important to have a re-look at the definition of State/other authorities under Article 12 of the Constitution. In view of the present set up of mixed economy i.e. where the State is in partnership with semi-government/private corporations that take over the Government companies in part or full. In support of his submission, he relies on the judgment of this Court in the case of Air India Statutory Corporation vs. United Labour Union Ors. [2]

26. Dr. Chauhan further submitted that when the Government, in the exercise of its executive power by way of a policy decision, creates an entity or divests its functions, which may have a bearing upon the Fundamental Rights, in favour of a private body or transfer of public entity to a private body, in such an eventuality, the functions earlier discharged by the Government cannot be termed as purely a private function. He submitted that realizing the necessity to promote, protect and enjoyment of human rights, including the right to freedom of expression, on the internet and in other technologies, the U.N. Human Rights Council has passed a resolution with regard to the same. Similarly, the right to telecommunication (Overseas), a service exclusively provided by Government of India before disinvestment has the public law element and, therefore, nature of work performed by VSNL/TCL continued to remain the same. He submits that the functions performed by VSNL would satisfy all the tests for determining whether a function is a public function provided under the Human Rights Act, 1998. Learned counsel has submitted that it is necessary to look at the nature of the public functions which have been transferred. He submits that the meaning of public function would have to be determined by taking into account the effect of transfer of the public function from a public body to a private body. Learned counsel submitted that in view of the above, it can be safely concluded that VSNL is performing a public function. He relied on the observations made by this Court in the case of Binny Ltd. vs. Sadasivan.[3] Besides, he relied on the judgment of this Court in Federal Bank Ltd. vs. Sagar Thomas and Ors.[4] Learned counsel also relied on a judgment of the Supreme Court of South Africa in Appeal of South Africa in Mittal Steel South Africa Limited (previously known as ISCOR Limited) vs. Mondli Shadrack Hlatshwayo, rendered in case No.326 of 2005 on 31st August, 2006.

27. Another submission made by Mr. Razdan is that the High Court has wrongly held that the functions performed by VSNL are not sovereign functions and, therefore, it cannot be said to be performing public functions. He submitted that the so called dichotomy between sovereign and non-sovereign functions of the State does not really exist. The question that whether a particular function of the State is a sovereign function depends on the nature of the power and manner of its exercise. Relying on the judgment of this Court in Secretary, Ministry of Information and Broadcasting vs. Cricket Association of Bengal[5], he submitted that airwaves or frequencies are public property. Their use has to be controlled and regulated by a public authority in the interest of the public and to prevent the invasion of their rights. The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, it cannot be said that VSNL is not performing a public function. Learned counsel also relied on the judgment of this Court in Andi Mukta

Sadguru Shree Muktaji Vandas Swami Suverna Jayanti Mahotsav Smarak Trust Ors. vs. V.R.Rudani Ors.[6]. Learned counsel has also placed reliance on the judgment of this Court in Unni Krishnan J.P. Ors. vs. State of Andhra Pradesh Ors.[7].

Employees Structure:

28. It was also submitted by Mr. Razdan that the Government had assured that the employees of the OCS will not be removed by the VSNL unless their case was placed before the competent authority in the Government. The solemn promise of not being removed was incorporated in the Conduct Discipline and Appeal Rules framed by the VSNL in the year 1992.

29. According to the appellants, the employees of the VSNL fall into three categories which are as under :

(a) The employees that were transferred to VSNL by notification dated 19th March, 1986 i.e. erstwhile employees of OCS.

(b) The employees who are recruited directly under the VSNL Recruitment and Promotion Rules, 1983 dated 21st May, 1993, subject to the rules of Conduct Discipline and Appeal Rules of 1992 framed by VSNL.

(c) The employees recruited after the disinvestment on 13th February, 2002. The employees of TATA are guided by TATA Conduct Rules. It is pointed out that VSNL was granted a licence by the Ministry of Communication for short distance service and long distance service. International Long Distance Service (ILDS) was granted by the Department of Telecommunication, Government of India under Section 4 of the Indian Telegraph Act. The licences of VSNL for ILDS which expired on 31st March, 2004 has been re-granted for another 20 years.

The brief factual matrix of case:

30. Civil Appeal No.2147 of 2010 pertains to the group of employees detailed in category ‘a’ above. The appellants in C.A.No.425 of 2012 are from category ‘b’. In C.A.No.2647 of 2010, the VSNL terminated the services of appellants 2, 3, and 4 on 13th July, 2007 and those of appellants 1, 5, and 6 on 16th July, 2007. The termination letter of appellant Nos. 2, 3, and 4 is issued by Vice President while as those of appellant Nos. 1 and 5 is issued by the Chief Officer Global operation.

The termination order of appellant No.6 is issued by the Chief International Facilities Officer.

31. According to the appellants, none of these officers were either competent or authorised officers to terminate the services of appellants in terms of Conduct Discipline and Appeal Rules of VSNL. Similarly, in C.A.No.421 of 2012, the services of the appellants were terminated by the Vice President without any authority of law. Challenging the order of the Division Bench in C.A.No.2147 of 2010, it is submitted that the Division Bench has erroneously held that the service rules governing the appellants do not have any statutory force and the status of the rules of a contract between the employer and the employee. The High Court failed to appreciate the issue raised in the writ petition that VSNL has breached the fundamental rules and regulations contained in its Conduct Discipline and Appeal Rules, 1992 which had the force of law. It was also pointed out that the Corporation (VSNL) being in partnership with Union of India is duty bound to uphold the rule of law. Learned Counsel submitted that the aforesaid judgment is liable to be set aside on the short ground that it is cryptic and non-speaking.

32. This submission was also reiterated by Dr.K.S. Chauhan, learned counsel. He submitted that the powers of the High Court under Article 226 is much wider than the powers of this Court under Article 32 of the Constitution of India. He relied on the Constitution Bench judgment of this Court inZee Telefilms Ltd. vs. Union of India[8]. In this case, the activities of Board of Cricket Control of India were held to be akin to public duties or State functions. On the basis of the above, he submitted that when a private body exercises public functions even if it is not a State, the aggrieved person would have a remedy by way of a writ petition under Article 226. Dr. Chauhan relied on a judgment of this Court in Ramesh Ahluwalia vs. State of Punjab Ors. in C.A.No.6634 of 2012 decided on 13th September, 2012.

33. In response, Mr. C.U. Singh, learned senior counsel appearing for the respondent has submitted that the tests for determining as to whether a particular body would fall within the definition of State or other authority have been well defined by this Court in a number of judgments. Therefore, there is no scope for enlarging the time tested definitions rendered by this Court. In support of the submissions, he relied on All India ITDC Workers Union Ors. v. ITDC Anr.[9];Pradeep Biswas v. Indian Inst. of Chemical Biology[10]; G.Bassi Reddy vs. International Corps Research Institute[11]; Balco Employees Union vs. Union of India Ors.[12]; Agricultural Produce Market Committee vs. Ashok Harikunj Anr.[13]

34. On the basis of the tests laid down in the aforesaid judgments, learned counsel submitted that VSNL is not a State or other authority under Article 226 of the Constitution. Therefore, both the High Courts have correctly held that the writ petitions would not be amenable against the VSNL.

35. Learned senior counsel then submitted that TCL erstwhile VSNL is not performing a public function or a mandatory public duty and, therefore, would not be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution. In support of the submission, learned counsel relied on G. Bassi Reddy (supra), and Binny Ltd. (supra).

36. He further submitted that without prejudice to the aforesaid two submissions, so far as employment/service contract is concerned, a writ petition would not be maintainable. The appellants would have to first exhaust the alternative remedies available. In support of this submission, he relied on Radhakrishna Agarwal vs. State of Bihar[14]; Binny Ltd. (supra),Kulchinder Singh vs. Hardayal Singh Brar[15] and Praga Tools Corp. vs. C.A.Imanual Ors.[16]

37. In view of the above, learned senior counsel submitted that all these appeals deserve to be dismissed.

38. We have considered the submissions made by the learned counsel for the parties. In essence, learned counsel for the appellants have made only two submissions –

> (i) That inspite of the Government of India holding only 26.97 % shares in VSNL now TCL, it would still fall in the definition of State or other authority within the ambit of Article 12 of the Constitution.
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> (ii) Even if it is held that VSNL/TCL is a purely private entity, it would be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India as it is performing a public function/public duty.

39. We are unable to accept the aforesaid submissions. We have earlier set out in detail the manner in which the function which was earlier being performed by OCS which were gradually transferred with effect from 1st April, 1986 to VSNL. Since 13th February, 2002, Government of India holds only 26.12 % shares of TCL. Therefore, it can be safely concluded that on the basis of the shareholding, the Government of India would not be in control of the affairs of TCL. In order for

TCL to be declared as a State or other authority within the meaning of Article 12 of the Constitution of India, it would have to fall within the well recognized parameters laid down in a number of judgments of this Court. In the case of Pradip Kumar Biswas (supra), a Seven Judge Bench of this Court considered the question as to whether Indian Institute of Chemical biology would fall within the definition of State or other authority under Article 12. Ruma Pal, J. speaking for the majority considered the manner in which the aforesaid two expressions have been construed by this Court in the earlier cases. The tests propounded for determining as to when the Corporation will be said to be an instrumentality or agency of the Government as stated, Ramana Dayaram Shetty vs. International Airport Authority of India[17] were summarized as follows :

> "(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p. 507, para 14)
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p. 508, para 15)
>
> (3) It may also be a relevant factor … whether the corporation enjoys monopoly status which is State-conferred or State-protected. (SCC p. 508, para 15)
>
> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)
>
> (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. (SCC p. 509, para 16)
>
> (6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government. (SCC p. 510, para 18)"

40. The aforesaid ratio in Ramana Dayaram Shetty (supra) has been consistently followed by this Court, as is evident from paragraph 31 of the judgment in Biswas (supra). Para 31 reads as under:

> "31. The tests to determine whether a body falls within the definition of "State" in Article 12 laid down in Ramana with the Constitution Bench imprimatur in Ajay Hasia form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited."

41. The subsequent paragraphs of the judgment noticed the efforts made to further define the contours within which to determine; whether a particular entity falls within the definition of other authority, as given in Article 12. The ultimate conclusion of the Constitution Bench are recorded in paragraph 39 and 40 as under :-

> "39. Fresh off the judicial anvil is the decision in Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers' Assn. which fairly represents what we have seen as a continuity of thought commencing from the decision in Rajasthan Electricity Board in 1967 up to the present time. It held that a company 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 is "an authority" within the meaning of Article 12.
>
> 40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be — whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

42. In view of the aforesaid authoritative decision of the Constitution Bench (Seven Judges), it would be wholly unnecessary for us to consider the other judgments cited by the learned counsel for the parties.

43. If one examines the facts in the present case on the basis of the aforesaid tests, the conclusion is inescapable that TCL cannot be said to be other authority within Article 12 of the Constitution of India. As noticed above, the share holding of Union of India would not satisfy test principles 1 and 2 in the case of Ramana Dayaram Shetty (supra).

44. On perusal of the facts, it would be evident that test No.3 would also not be satisfied as TCL does not enjoy a monopoly status in ILDS. So far as domestic market is concerned, there is open competition between the numerous operators, some of which have been enumerated earlier namely, MTNL, Airtel, Idea, Aircel, etc. This brings us to the 4th test and again we are unable to hold that the Government of India exercises deep and pervasive control in either the management or policy making of TCL which are purely private enterprises. We may also notice that in fact even Government Companies like MTNL and BSNL are competitors of TCL, in respect of ILDS. We are, therefore, of the firm opinion that the High Court of Delhi and the High Court of Bombay were fully justified in rejecting the claim of the appellants that TCL would be amenable to writ jurisdiction of the High Court by virtue of the other authority within the purview of Article 12 of the Constitution of India.

Is TCL performing a public function :-

45. It has been noticed earlier that ILDS functions, prior to 1986, were being performed by OCS, a Department of Ministry of Communications. VSNL was incorporated under the Indian Companies Act, 1956 as a wholly owned Government company to take over the activities of erstwhile OCS with effect from 1st April, 1986. The employees of erstwhile OCS continue to work for VSNL on deputation till 1st January, 1990. However, as noticed earlier, an option was given in 1989 to the pre 1986 employees for permanent absorption in VSNL. It was made clear to all the employees that they would be permanently absorbed in VSNL upon resigning from the Government of India. It was also made clear that these employees had the choice to remain as Government employees but they would be transferred to surplus staff cell of Government of India for re-deployment against the vacancies in other government offices. It is an accepted fact before us that all the appellants opted to be absorbed in VSNL. They were, in fact, absorbed in VSNL with effect from 1st January, 1990. In the staff notice issued on 11th December, 1989, it was also made clear that OCS employees transferred to VSNL on deputation basis without deputation allowance on foreign service terms will cease to be government servants. It is, therefore, patent that the appellant accepted

the absorption voluntarily. Therefore, it would be difficult to accept the submission of the learned counsel for the appellants that even after absorption in VSNL, the appellants continued to enjoy the protection available to them in the OCS as government servants. The appellants have, however, sought to rely on the memorandum No.4/18/87–P PWD dated 5th July, 1989 of the Department of Pension and Pensioners' Welfare, Government of India. In the said letter, certain safeguards have been granted to ex-OCS employees which are as under:

> "Dismissal/removal from the service of a public sector undertaking/autonomous body after absorption for any subsequent misconduct shall not amount to forfeiture of his retirement benefits for the service rendered in the Central Government. Also in the event of Dismissal/removal of a transferred employee from the public sector undertaking/autonomous body the employee concerned will be allowed protection to the extent that the administrative Ministry/Department will review such order before taking a final decision."

46. In our opinion, the aforesaid condition would make no difference to the legal status of the appellants within VSNL. It was only an assurance that the rights to pension which had already accrued to them on the basis of their service in OCS shall be protected. Undoubtedly, this assurance was accepted by VSNL on 1st May, 1992. It was, in fact, incorporated in the rules governing the service conditions of these employees in VSNL. It is a matter of record that with effect from 13th February, 2002, the shareholding of Government of India is 26.97 %. Soon thereafter, the total shareholding of TATA Group in VSNL increased to 44.99% of the paid up share capital in 2002. It is also an accepted fact that shareholding of the TATA Group in VSNL is 15.11%. It is also noteworthy that since 2002, VSNL was a TATA Group Company and accordingly on 28th January, 2008 its name was changed to 'TATA Communication Limited". In our opinion, the aforesaid facts make it abundantly clear that the Government of India did not have sufficient interest in the control of either management or policy making functions of TATA Communication Limited.

47. Merely because TATA Communication Limited is performing the functions which were initially performed by OCS would not be sufficient to hold that it is performing a public function. It has been categorically held in the case of Ramana Dayaram Shetty (supra) if only the functions of the Corporation are of public importance and closely related to Government functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of the Government.

48. As noticed above, the functions performed by VSNL/TCL are not of such nature which could be said to be a public function. Undoubtedly, these operators provide a service to the subscribers. The service is available upon payment of commercial charges. Learned counsel for the appellants had placed strong reliance on the judgment of this Court in Air India Statutory Corporation (supra). However, the aforesaid judgment is of no assistance to the appellants as it was subsequently overruled by a Constitution Bench in Steel Authority of India Ltd. Ors. vs. National Union Waterfront Workers Ors.[18]. Dr. K.S. Chauhan had also relied on the Human Rights Act, 1998 (Meaning of Public Function) Bill which sets out the factors to be taken into account in determining whether a particular function is a public function for the purpose of sub-section (3)(b) of Section 6 of the aforesaid Act. Section (1) enumerates the following factors which may be taken into account in determining the question as to whether a function is a function of public nature.

> "(a) the extent to which the state has assumed responsibility for the function in question ;
>
> (b)the role and responsibility of the state in relation to the subject matter in question ;
>
> (c) the nature and extent of the public interest in the function in question ;
>
> (d) the nature and extent of any statutory power or duty in relation to the function in question ;
>
> (e) the extent to which the state, directly or indirectly, regulates, supervises or inspects the performance of the function in question ;
>
> (f) the extent to which the state makes payment for the function in question ;
>
> (g) whether the function involves or may involve the use of statutory coercive powers ;
>
> (h) the extent of the risk that improper performance of the function might violate an individual's Convention right.
>
> Performance of public function by private provider –

49. For the avoidance of doubt, for the purposes of Section 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function which is required or enabled to be performed wholly or partially at public expense, irrespective of –

> (a) the legal status of the person who performs the function, or
>
> (b) whether the person performs the function by reason of a contractual or other agreement or arrangement".

50. In our opinion, the functions performed by VSNL/TCL examined on the touchstone of the aforesaid factors cannot be declared to be the performance of a public function. The State has divested its control by transferring the functions performed by OCS prior to 1986 on VSNL/TCL. Dr. Chauhan had also relied on Binny Ltd. (supra) wherein this Court reiterated the observations made by this Court in Dwarkanath vs. Income-tax Officer, Special Circle, D-ward, Kanpur Anr. [19], it was observed that :

> "It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."

51. This Court also quoted with approval the Commentary on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf Jowell in Chapter 3 para 0.24 therein it has been stated as follows :

> "A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.
>
> Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognize the realities of

executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted." Non-governmental bodies such as these are just as capable of abusing their powers as is government."

52. These observations make it abundantly clear that in order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so. In the present case, as noticed earlier, all telecom operators are providing commercial service for commercial considerations. Such an activity in substance is no different from the activities of a bookshop selling books. It would be no different from any other amenity which facilitates the dissemination of information or DATA through any medium. We are unable to appreciate the submission of the learned counsel for the appellants that the activities of TCL are in aid of enforcing the fundamental rights under Article 21(1)(a) of the Constitution. The recipients of the service of the telecom service voluntarily enter into a commercial agreement for receipt and transmission of information. The function performed by VSNL/TCL cannot be put on the same pedestal as the function performed by private institution in imparting education to children. It has been repeatedly held by this Court that private education service is in the nature of sovereign function which is required to be performed by the Union of India. Right to education is a fundamental right for children upto the age of 14 as provided in Article 21A. Therefore, reliance placed by the learned counsel for the appellants on the judgment of this Court in Andi Mukta (supra) would be of no avail. In any event, in the aforesaid case, this Court was concerned with the non-payment of salary to the teachers by the Andi Mukta Trust. In those circumstances, it was held that the Trust is duty bound to make the payment and, therefore, a writ in the nature of mandamus was issued. Mr. C.U.Singh, senior counsel relied on Binny Ltd. (supra) in support of the submissions that VSNL/TCL is not performing a public function. In our opinion, the observations made by this Court in the aforesaid judgment are fully applicable in the facts and circumstances of this case.

53. In these appeals, the claim of the appellants is that their services have been wrongly terminated by VSNL/TCL in breach of the assurances given by the Government of India and VSNL in clause 5.13 of the share holding agreement. If that be so, they would be at liberty to seek redress by taking recourse to the normal remedies available under law.

54. A perusal of the aforesaid documents, however, would show that VSNL had merely promised not to retrench any employee who had come from OCS for a period of two years from 13th February, 2002. Such a condition, in our opinion, would not clothe the same with the characteristic of a public duty which the employer was bound to perform. The employees had individual contacts with the employer. In case the employer is actually in breach of the contract, the appellants are at liberty to approach the appropriate forum to enforce their rights.

55. We see no merit in the appeals and the same are accordingly dismissed.

Writ Petition No.689 of 2007 -

56. This writ petition has been moved by the VSNL Scheduled Castes/Tribes employees Welfare Samiti (Regd.) (Petitioner No.1) and Scheduled Castes and Schedule Tribes Employees Welfare Association of VSNL (Regd.)-Petitioner No.2.

57. The prayer in this writ petition is inter alia for the issuing a writ in the nature of mandamus directing the official respondents to safeguard the fundamental rights of the members of the appellant as per the undertaking given on 16th March, 2001, 9th October, 2001 and 30th April, 2002. For the reasons already stated in the earlier part of the judgment relating to the civil appeals, we are unable to entertain the present writ petition. In our opinion, it is not maintainable and accordingly dismissed.

[1] (1996 (2) SCC 405)
[2] (1997 (9) SCC 377)
[3] (2005) 6 SCC 657
[4] (2003) 10 SCC 733).
[5] (1995) 2 SCC 122
[6] (1989) 2 SCC 691
[7] (1993) 1 SCC 645
[8] 2005 (4) SCC 649.
[9] 2006 (10) SCC 66
[10] 2002 (5) SCC 111]
[11] 2003 (4) SCC 225
[12] 2002 (2) SCC 333
[13] 2000 (8) SCC 61.
[14] 1977 (3) SCC 457

[15] [1976 (3) SCC 828]
[16] [1969 (1) SCC 585].
[17] (1979) 3 SCC 489
[18] (2001 (7) SCC 1)
[19] (1965 (3) SCR 536)