

JAMMU AND KASHMIR HIGH COURT

Jagdish Chander Gupta

Vs.

Jammu and Kashmir Bank Ltd

Letters Patent Appeal (Writ) No. 34 of 1985

(A.S. Anand, Actg. C.J. and M.L. Bhat, J.)

19.12.1984

JUDGEMENT

M.L Bhat, J.

1. The appellant-petitioner is an employee of the Jammu and Kashmir Bank Limited. A writ petition came to be filed by him before the Court which came to be decided by the learned single Judge vide his order dated 24-8-1984. The appellant had prayed relief of *certiorari* and mandamus against the respondent Bank and other respondents who are various officials of the Bank. The writ petition was dismissed by the learned single Judge as in his opinion the enquiry conducted against the appellant was valid and the High Court was not a Court of appeal to over-set the decision arrived at a departmental enquiry by a competent authority. About the maintainability of the writ petition the learned single Judge held that on merits the appellant had no case, therefore it was not necessary for him to consider as to whether respondent-Bank was authority amenable to the writ jurisdiction of the Court within the meaning of Article 12 of the Constitution of India. The appellant has come up in appeal to this Court.

2. At the time of admission of this appeal Mr. Bhagotra appearing for the respondents raised a preliminary objection about the maintainability of the writ petition. His objection is that Jammu and Kashmir Bank Limited and its officers are not authorities within the meaning of Article 12 of the Constitution of (India and are not amenable to the writ jurisdiction of) this Court. The objection raised by Mr. Bhagotra is of considerable importance, as such we have heard the learned counsel for the parties on this point in detail.

3. Mr. Joginder Singh appearing for the appellant submitted that on the basis of a Supreme Court authority viz : *Ajay Hasia v. Khalid Mujib*¹, the respondent Bank is an authority for the purposes of Article 12 of the Constitution of India and amenable to the writ jurisdiction of the High Court. The contention is that in terms of Articles of Association of the respondent Bank, it is a Government Company within the meaning of Section 617 of the Companies Act, and therefore, is to be treated as an instrumentality or agency of the Government. He next contended that the State Government has issued directions to its departments that they should conduct all

¹ AIR 1981 SC 487

business through the Jammu and Kashmir Bank Limited and thirdly because the Chairman of the respondent Bank is to be appointed by the State Government, therefore, also it should be treated under the administrative control of the Government and would be as such treated as an authority within the meaning of Article 12 of the Constitution of India.

4. It is necessary to refer to the Memorandum and Articles of Association of the respondent Bank to find out the object and the functioning of the respondent Bank. As early as on 1-10-1983 about eight promoters had formed the Jammu and Kashmir Bank and got it registered in accordance with the provisions of Jammu and Kashmir Companies Act of 1977 (1920 A. D.) Act No.XI of 1977. The said Act was repealed subsequently and Companies Act of 1956 by means of the Jammu and Kashmir (Extension of Laws) Act, 1956 was made applicable to the State of Jammu and Kashmir and respondent No.1 came to be regulated by the Companies Act of 1956. It was provided in the Articles of Association that the respondent-Bank shall be Government Company within the meaning of Section 617 of the Companies Act. The object of the Bank for which it was established was to carry on banking business and transact all other business in relation to borrowing, receiving or taking of money, lending or advancing of money, drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promisory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scripts and other instruments and securities etc. etc. It was to act as agents for Governments or local authorities or for any other persons or persons for carrying on agency business of any description excluding the business of a managing agent but including the power to act as attorneys and to give discharges and receipts; contracting for public and private loans and negotiating and issuing the same. It could enter into any arrangement or agreement with his Highness' Government Jammu and Kashmir to act as Bankers for and to pay, receive, collect and remit money, bullion, on behalf of the Government. It could also enter into partnership for sharing profits with any person or company carrying on or engaged in any business or transaction which the company is authorized to carry on or engaged in, various other objects are prescribed in the Articles of Association. in Annual General Meeting held on 5-7-1958 authorized share capital of the respondent Bank was diminished by a resolution.

5. The share capital of the company Bank on the date of adoption of Articles of Association was Rupees Thirty Lakhs divided into 1,20,000 shares of Rs. 25/- each.

The allotment of the shares is vested in the Directors of the Bank at their absolute discretion. In other matter Companies Act of 1956 applicable to rest of India is to govern the affairs of the respondent Bank. The management of the business of the Bank shall be carried on by the Chairman subject to the control of Board of Directors. The number of Directors shall not be more than ten or less than seven out of these not more than three shall be appointed by the Jammu and Kashmir Government, who will be called Government Directors. No Director other than the Government Director shall be elected as Chairman of the Board of Directors of the respondent Bank. The Articles also provide method of transaction of business which is not relevant for our purpose.

6. It is true that the respondent Bank is a Government Company within the meaning of Section 617 of the Companies Act. Government Company for the purpose of the Companies Act means any Company in which not less than 51% of the paid up share capital is held by the Central Government or by any State Government or Governments or partly by the State Government and partly by one or more State Governments and includes a company which is a subsidiary of a

Government company as thus defined. From the perusal of Section 617 it appears that Government Company is one in which the Government has majority of shares. The entire paid up share capital of the respondent Bank is not held by the State Government or by the Central Government or by both the Governments. Merely because the respondent Bank is a Government Company it cannot be held that it is either a Government Corporation or an industry run by or under the authority of the Government. We say so on the authority of *Praga Tools Corporation v. C.V. Imanuel*², The only attribute of the Government Company, therefore is that the Government must be owning large number of paid up share capital. It is not a Govt. Corporation or an industry run under the authority of the Government. Therefore, the first contention of Mr. Joginder Singh that it is a Govt. Company defined in the Articles of Association and therefore, is to be treated as a Corporation or an industry run by the Government cannot be accepted.

7. The State Government may have issued instructions to various departments to transact all banking business through the respondent Bank. That by itself will not make the respondent Bank as a Corporation run by the Government or an industry run by the Government. Because it owns large portion of share capital therefore, the Government may be interested in more business being conducted by the respondent Bank. This fact will not make the respondent Bank a corporation or an industry run by the State Government.

8. That the Chairman of the respondent Bank is to be appointed from amongst the Government Directors is the requirement of Articles of Association of the Bank. Out of ten Directors, seven are from general public because the public also owns paid up share capital of the Bank. Three Directors are only to be appointed by the State Government and because the State Govt. owns large portion of the paid up share capital, therefore, one of its Directors is to be the Chairman of the respondent Bank. That *per se* will not make it a corporation or an industry run by the Government. The State Government has not established the respondent Bank when it came into being in the year 1938. Its establishment was promoted by private individuals who are named in the Memorandum of Association framed for the respondent Bank. Two promoters, out of eight, were then in the service of His Highness. Six were from the general public and an organizer was also from the general public. For the first time it came to be defined as a Government Company after the Companies Act of India 1956 was extended to the State of Jammu and Kashmir.

9. In view of the aforesaid facts now it is to be seen whether respondent Bank can be termed as an agency or an instrumentality of the State Government for the purpose of Article 12 of the Constitution of India. In *Ajay Hasia's case* (AIR 1981 SC 487) (Supra) the Supreme Court laid down certain relevant tests for determining whether a company/society/corporation can be held to be an agency or instrumentality of the

² AIR 1969 SC 1306

State Government. These tests are as under :

"(1) One thing is clear that if the entire share capital of the corporation is held by Govt. it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.

(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 imp Regulation ted with governmental character.

- (3) It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State or State protected.
- (4) Existence of deep and pervasive State control may afford an indication that the Corporation is a State Agency or instrumentality.
- (5) If the functions of the corporation 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 Govt.
- (6) Specifically, if a department of Govt. 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."

10. Proceeding further, the Supreme Court held that it was immaterial whether the corporation was created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it was created. In the said case their Lordships proceeded to observe that the Government may act through the instrumentality or of a natural person or it employ the instrumentality or agency of judicial person to carry out its functions. The test is that it will be considered to be an agency and instrumentality of the State. It is true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management but behind the formal ownership which is cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government, and it is in fact the Government which acts through the instrumentality or agency of the corporation or the juristic person. If the instrumentality and agency of the Govt. discharges the Governmental functions it must be subject to same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. In *Ajay Hasia's case* (AIR 1981 SC 487) (supra) the Supreme Court was considering the obligations of the instrumentalities and agencies of the Government to respect the fundamental rights of the citizens and they were held to be bound to enforce the fundamental rights guaranteed to the citizens of India under Part III of the Constitution of India. If this binding was not there, the fundamental rights in the opinion of the Supreme Court would then be reduced to an idle dream or a promise of unreality. Because in the constitution philosophy of a democratic socialist public Govt. has to undertake a multitude of socio-economic operations and the Govt. having regard to the practical advantages of functioning through the legal device of a corporation by resorting to create instrumentalities or agencies which will not exonerate the Govt. itself from obeying the fundamental rights of the citizens. In the context of enforcing fundamental rights, the Supreme Court laid emphasis that by process of judicial construction fundamental rights cannot be rendered futile and meaningless. Because in the opinion of the Apex Court, it is the fundamental rights which alone with the directive principles constitute the life force of the Constitution of India and they must be put into effective action by meaningful and purposeful interpretation. Therefore, it was observed that if a corporation or a company is the instrumentality or agency of Government, it must be held to be an authority within the meaning of Article 12 of the Constitution and subject to the same basic obligation to obey the fundamental rights as the Government.

11. From the aforesaid discussion we have to analyze as to whether respondent Bank fulfills all

or any of the tests laid down by the Supreme Court for clothing it with the status of an instrumentality or agency of the State. Entire share capital of the respondent Bank is not owned by the State Government. It owns only a major portion of it, rest of it is owned by private persons. Therefore, according to this test, respondent Bank cannot be held to be an authority for purposes of Article 12 of the Constitution of India as it is not an instrumentality or agency of the State Government.

12. The entire expenditure is not met with the financial assistance of the State Government of the respondent-Bank, therefore it cannot be termed as an agency or instrumentality of the State Government.

13. It does not enjoy monopoly status which is the State conferred or State protected. Enjoyment of monopoly would mean that the respondent Bank is the only Bank conducting banking business under the patronage of the State Government. It may have monopoly *qua* the State Government but it has no monopoly status in the State which is protected by any law. Therefore, it cannot be termed as an instrumentality or agency of the State Govt.

14. It has no deep or pervasive State control. Its administrative control is vested in the Board of Directors, majority of them are from the general public. Administration of the respondent Bank is vested in the Board of Directors and not in the State Government. From among the public it can have seven members on the Board of Directors who are in no way connected with the State Government.

15. Its functions are not of public importance and closely related to the Government functions. It is a business concern and cannot be said to be discharging any functions which is closely related to the Govt. functions. There is no obligation on the Government to run a banking business. It may patronize a Bank or it may transact its business with a Bank but that would not mean that the respondent Bank is discharging the functions which are closely related to the government functions.

16. Lastly and finally it may be said that it is not a Government department transferred to the Corporation. It was established as a business concern for purposes of transacting banking business by eight individuals under the Company law then applicable to the State. Only two of them were in the service of the His Highness. It had its own origin and separate existence.

17. In *P.K. Ramachandra Iyer v. Union of India*³, Indian Council of Agricultural Research (ICAR for short) was held to be an authority within the meaning of Article 12 of the Constitution of India. ICAR had come into existence as a department of the Govt. of India and continued to be an attached office of the Government even though it was registered as a society under the Societies Registration Act. It was held to be inseparable adjunct of the Government of India Therefore, was termed as an instrumentality and agency of the Government of India.

18. In *A.L. Kalra v. The Project and Equipment Corp. of India Ltd*⁴, Project and Equipment Corporation of India Limited was held to be an authority within the meaning of Article 12 of the Constitution of India and was part of the State Trading Corporation, a Govt. of India Undertaking.

19. In *B.S. Minhas v. Indian Statistical Institute*⁵, the Indian Statistical Institute has been held to be an authority within the meaning of Article 12 of the Constitution of India because it was entirely controlled by the Union of India and it was wholly financed by Union of India. Its functions were also controlled by the Union of India.

20. In a Full Bench decision of this Court viz. *Pyara Lal Sharma v. Managing Director, J. and K. Industries Ltd*⁶, it was held by this Court that JandK Industries Limited, is an authority within the meaning of Article 12 of the Constitution of India. It may be mentioned here that the JandK Industries Limited was established in 1963 by means of a Government order. Various Industries run by the State Government were found to be sick units and were brought under the control of the JandK Industries Ltd. for purposes of smooth running. The share capital of the company is wholly owned by the State Government, its administrative control is also with the State Government and it was previously a department of the State Govt. transferred to the company. Therefore, relying on the authority of Ajay Hasia's case (Supra) the Full Bench held that it was an agency and instrumentality of the State Government. It also overruled *Abdul Ahad Loan v. Manager Govt. Woollen Mills*⁷,

21. From the above discussion it will be clear that unless a company, corporation or a society has any of the attributes as laid down by the Supreme Court in Ajay Hasia's case (AIR 1981 SC 487) (Supra) it cannot be deemed as an instrumentality or agency of the State Government and will not be termed as an authority for the purposes of Article 12 of the Constitution of India We have given in detail the functions, administrative control and financial control of the respondent Bank. It does not fulfil any of the tests laid down in Ajay Hasia's case (supra) so as to make it an instrumentality or agency of the State Government nor can it be termed as an authority within the meaning of Article 12 of the Constitution of India. Therefore, the preliminary objections raised by Mr. Bhagotra prevail and it is held that the respondent bank and its officials are not authorities for purposes of Article 12 of the Constitution of India and are not amenable to the writ jurisdiction of this Court. Therefore, the writ petition is held to be incompetent and we do not propose to go into the merits of the

³ AIR 1984 SC 541

⁵ AIR 1984 SC 363.

⁴ AIR 1984 SC 1361

⁶ Writ Petn. No.661 of 1982 decided on 29-8-1984: (AIR 1985 Jam and Kash 33)

⁷ AIR 1979 JandK 57

controversy. Consequently the appeal fails which is dismissed. Before parting with this case, we may point out that merely because a juristic entity may be an authority and therefore a State within the meaning of Article 12 of the Constitution of India, it cannot be elevated to the position of a State for the purpose of Articles 309, 310 and 311 of the Constitution of India which are incorporated in Part XIV of the Constitution. A juristic entity which is State for the purpose of Parts III and IV of the Constitution of India would not be so for the purpose of Part XIV or for any other provision of the Constitution of India. We are fortified in our view by the dictum of the Supreme Court in Ajay Hasia's case (supra).

Appeal dismissed.