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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 08.02.2016**

+ **LPA 84/2016, CM APPL.4562-4564/2016**

SHARAD KUMAR Appellant
Through: Mr. Sharad Kumar, appellant in person.

Versus

CONFEDERATION OF INDIAN INDUSTRY & ANR Respondents
Through: Mr. Ajit Warrier with Ms. Tarunima Vijra,
Advocates for Resp-1.
Mr. Vikas Mahajan with Mr. Rohan Gupta and Mr.
Sumit Rajput, Advocates for Resp-2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J. (ORAL)

1. This Letters Patent Appeal challenges an order dated 17.11.2015 of the learned Single Judge of this Court dismissing the appellant's writ petition.
2. Briefly, the facts of this case are that on 01.10.2010, the appellant was appointed as Director on regular and full time basis by the first Respondent (CII). He was assigned the duties of internal legal counsel of CII. On 30.03.2015, he was relieved of his employment. The appellant claims that he has been ousted from his job in an arbitrary and illegal manner, and therefore, seeks reinstatement of his employment. He approached this Court by filing a writ petition under Article 226 of the Constitution of India.
3. The learned Single Judge in the impugned order held that the writ petition is not maintainable as CII is neither 'State' under Article 12, nor discharges any 'public function' for the purposes of Article 226. On the point of whether CII

discharges any public function, the Court distinguished the present case from the case of *Board of Control for Cricket in India v. Cricket Association of Bihar & Ors.* (2015) 3 SCC 251 by holding that there is no public law element in the functioning of CII. Further in the context of 'State' the learned Single Judge held that CII would not fall under such definition as contemplated under Article 12 since CII does not satisfy the test laid down in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111. According to this judgment, the government must have '*financial, functional and administrative control*' over the body in question. Further, such control must be pervasive and particular to the body in question. It is clear that there is no '*deep and pervasive*' financial, functional or administrative control of the government over CII. The learned Single Judge also held that CII does not perform any 'public function' for the purposes of Article 226, as it does not satisfy the requirements of the test laid down in *BCCI* case (*supra*).

4. The appellant submits that even if CII is not 'State' under Article 12, it performs a 'public function' under Article 226. He further argues that the learned Single Judge erred in holding that CII was not discharging 'public function' as the said finding is contrary to the law laid down by the Supreme Court in the case of *BCCI* (*supra*).

5. This Court notices that the crux of the issue of maintainability, therefore, rests upon the question of whether CII discharges any 'public function' for the purposes of Article 226. It is now a settled position of law that for a body to be amenable to the writ jurisdiction of the Court under Article 226, it need not be 'State' as required under Article 12. In the case of *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. V.R. Rudani & Ors.* (1989) 2 SCC 691, the Apex Court distinguished between Article 32 and Article 226:

“The term ‘authority’ used in the context, must receive a liberal meaning unlike the term in Article 12, which is relevant only for the purpose of enforcement of fundamental rights under Article 32... The words ‘any person or authority’ used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty.” (emphasis supplied)

The majority opinion of a five Judges’ Bench of the Supreme Court further upheld this proposition in *Zee Telefilms & Anr. v. Union of India* (2005) 4 SCC 649:

“Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226.”

6. The test of what constitutes an authority performing ‘public function’ was laid down in *BCCI* (supra) case. The Supreme Court conducted a detailed analysis of when a body can be called an authority performing public function:

“The majority view thus favours the view that BCCI is amenable to the writ jurisdiction of the High Court under Article 226 even when it is not ‘State’ within the meaning of Article 12. The rationale underlying that view if we may say with utmost respect lies in the ‘nature of duties and functions’ which the BCCI performs. It is common ground that the respondent-Board has a complete sway over the game of cricket in this country. It regulates and controls the game to the exclusion of all others. It formulates rules, regulations norms and standards covering all aspect of the game. It enjoys the power of choosing the members of the national team and the umpires. It exercises the power of disqualifying players which may at times put an end to the sporting career of a person. It spends crores of rupees on building and maintaining infrastructure like stadia, running of cricket academies and Supporting State Associations. It frames pension schemes and incurs expenditure on coaches, trainers etc. It sells broadcast and telecast rights and collects admission fee to venues where the matches are played. All these activities are undertaken with the tacit concurrence of the State Government and the Government of India who are not only fully aware but supportive of the activities of the Board. The State has not chosen to bring any law or taken any other step that would either deprive or dilute the Board’s monopoly in the field of cricket...Any organization or entity that has such pervasive control over the game and its affairs and such powers

as can make dreams end up in smoke or come true cannot be said to be undertaking any private activity. The functions of the Board are clearly public functions, which, till such time the State intervenes to takeover the same, remain in the nature of public functions, no matter discharged by a society registered under the Registration of Societies Act. Suffice it to say that if the Government not only allows an autonomous/private body to discharge functions which it could in law takeover or regulate but even lends its assistance to such a non- government body to undertake such functions which by their very nature are public functions, it cannot be said that the functions are not public functions or that the entity discharging the same is not answerable on the standards generally applicable to judicial review of State action”.(emphasis supplied)

The law on what constitutes ‘public function’ for the purposes of Article 226 was also laid down in the case of *Andi Mukta Sadguru* case (*supra*):

“...The term ‘authority’ appearing in Article 226 of the Constitution would cover any other person or body performing public duty. The guiding factor, therefore, is the nature of duty imposed on such a body, namely, public duty to make it eligible to Article 226. The words “Any person or authority” used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party.”(emphasis supplied)

7. It is clear that functions of any body or entity should be essentially in the nature of public duty or akin to the functions of State - for instance, regulating a sport entirely at national level. The body in question must have ‘pervasive control’ or monopoly over the activity, as in the case of *BCCI* (*supra*). Further, there should be some positive obligation of a public nature.

8. In this case, CII is a body registered under the Societies Registration Act, 1860. The objects of the society relate to promotion of knowledge of engineering, science and technology, to promote the industry of engineering and encourage the efficiency of the industry itself. It also seeks to maintain a cordial dialogue

between the industry and Government, and to assist the engineering industry to meet its social obligations. Further, it promotes cooperation between members for promotion of their common interests. It negotiates and enters into any arrangement with Governmental bodies for the promotion of interests of its members. Overall, it seeks to enhance the contribution of the engineering industry to the growth and development of the economy. CII served as an umbrella group for SMEs as well as MNCs involved in these activities.

9. It is apparent therefore, that CII acts as a trade group involved with the Government in a consultative and advisory capacity. The functions performed by it, if are not akin to State functions, it only serves as a platform network for government, industry and other stakeholders. CII neither owes any positive duty of a public nature nor does it have any 'pervasive control' or monopoly over any activity like the BCCI has over the cricket. Further, the functions are not in any way akin to the duties of the State. Thus, it is clear that though the functions performed by CII are important and beneficial, they are not in the nature of 'public duty'. Further, as held in *G. Bassi Reddy v. International Crops Research Institute & Anr.* [(2003) 4 SCC 225], merely because the Indian public is benefited by the activity of an organization, it cannot be claimed that the organization is performing public function:

"...Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty.. While the Indian public may be the beneficiary of the activities of the institute, it certainly cannot be said that the ICRISAT owes a duty to the Indian public to provide research and training facilities."(emphasis supplied)

It was held, in *Binny v V. Sadasivan*, 2005 (6) SCC 657 by the Supreme Court that:

"the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced."

10. The learned Single Judge held - in this case, that the existence of a public sector undertaking as a member of the Confederation would not make the confederation an entity of the Government. The procedure of membership is well laid down that the membership is open to any firm or company involved in the manufacturing sector in India. Therefore, CII is not amenable to writ jurisdiction under Article 226 of the Constitution of India.

11. This Court is of opinion that the conclusions of the learned Single Judge that even if it is assumed that CII is a body performing public duties, its decision, i.e., termination of the appellant's employment, does not have any public element. This position was held by the Supreme Court in the case of *K.K. Saxena v. ICID*, 2015 (4) SCC 670:

"There is yet another very significant aspect which needs to be highlighted at this juncture. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review, as already pointed out above. Only those decisions which have public element therein can be judicially reviewed under writ jurisdiction. In the Praga Tools Corporation v. Shri C.A. Imanual & Ors., as already discussed above, this Court held that the action challenged did not have public element and writ of mandamus could not be issued as the action was essentially of a private character. That was a case where the concerned employee was seeking reinstatement to an office."(emphasis supplied)

12. In view of the foregoing reasons, the appeal has to fail. The learned Single Judge is right in holding that the petitioner is at liberty to approach the appropriate authority under the Payment of Gratuity Act for his claims with respect to the

payment of gratuity. It is also open to him to seek other remedies available in law.
The appeal is dismissed.

S. RAVINDRA BHAT
(JUDGE)

DEEPA SHARMA
(JUDGE)

FEBRUARY 08, 2016

