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

+ LPA 162/2020 & CM 13006/2020

JITENDRA SINGH & ORS

..... Appellants

Through: Mr. Gunjan Singh and Ms. Pragya
Ganjoo, Advocates

versus

SECURITRANS INDIA PVT. LTD.

..... Respondent

Through: Mr. Gulshan Chawla, Advocate

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER

% **22.06.2020**

HEARD THROUGH VIDEO CONFERENCING

1. The appellants/petitioners are aggrieved by the judgment dated 20th May, 2020 passed by the learned Single Judge dismissing a writ petition filed by them praying *inter alia* for issuance of a writ/direction to the respondent/company, where they were employed, not to terminate their services and further, to release all arrears of wages.

2. By the impugned order, the learned Single Judge has dismissed the writ petition filed by the appellants/petitioners on the ground that the same does not lie under Article 226 of the Constitution of India.

The learned Single Judge has held that the respondent/company is a private company and is not a State or any other Authority and nor is it funded by the Government. The claim of the appellants/petitioners that termination of their services during the COVID-19 period is illegal, has been rejected by the learned Single Judge by holding that termination of the services of the appellants/petitioners is for the reasons other than COVID-19, i.e., for their alleged misconduct on account of misappropriation of currency handed over to them by the respondent/company as custodians, for topping up in ATM branches of different banks. Lastly, the learned Single Judge has held that even if the Labour Courts are not functioning, as contended by the appellants/petitioners, the dispute raised by them can be agitated before the Labour Courts within a period of one year from the date of the cause of action and it is expected that by that time, the Labour Courts shall start functioning.

3. Mr. Gunjan Singh, learned counsel for the appellants/petitioners states that the learned Single Judge fell into an error by observing that the respondent/company is not a State and nor is it discharging duties of the State inasmuch as it undertakes the work of distributing currency in different ATM branches operated by banks and the same ought to be treated as a public duty.

4. The contention that the respondent/company enters into contracts with various banks to replenish the ATM branches with currency handed over to it, can hardly be treated as a public function. The respondent/company is not a State or an Authority against which a writ petition is maintainable within the meaning of Article 12 of the

Constitution of India.

5. The test for determining as to whether an Authority is an instrumentality of the State or not is no longer *res-integra*. The Supreme Court in Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489, has laid down the parameters or guidelines for determining whether a body falls within the sweep of the definition of "other Authorities", as contemplated in Article 12 of the Constitution of India. The said judgment has been summarized by a Five-Judge Bench of the Supreme Court in Zee Telefilms Ltd. & Another v. Union of India & Ors., (2005) 4 SCC 649 as under:

"(1) "[O]ne 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."

(2) "[W]here 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."

(3) "It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected."

(4) "[E]xistence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality."

(5) "If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government."

(6) "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."

After analysing the entire case law on the subject, a Seven-Judge Bench of the Supreme Court in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Ors., (2002) 5 SCC 111, , has concluded as under:

"40. The picture that ultimately emerges is that the tests formulated in **Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258]** are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesis, 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."

6. Applying these tests, it cannot be said that the respondent/company herein would by any stretch of imagination be treated as an Authority or an instrumentality of State within the

definition of Article 12 of the Constitution of India.

7. This Court concurs with the finding of the learned Single Judge that the respondent/company is not performing any public function and therefore, a writ petition under Article 226 of the Constitution of India is not maintainable against it. It is well settled that matters which come purely under the realm of a contract between two parties are not amenable to writ jurisdiction. In Binny Ltd. & Anr. v. V. Sadasivan & Ors., (2005) 6 SCC 657, while dealing with a writ petition which arose from a contract between an employer and an employee, the Supreme Court has laid down the guidelines as to what should be termed as a public function. Paras 11, 19, 21, 22, 29 & 31 of the said judgment are apposite and read as under:

"11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there

are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are 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. In **a book on Judicial Review of Administrative Action (5th Edn.) by de Smith, Woolf & Jowell in Chapter 3, para 0.24**, it is stated thus:

“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. This may happen in a wide variety of ways. For instance, a body is performing a public function when it provides ‘public goods’ or other collective services, such as health care, education and personal social services, from funds raised by taxation. A body may perform public functions in the form of adjudicatory services (such as those of the criminal and civil courts and tribunal system). They also do so if they regulate commercial and professional activities to ensure compliance with proper standards. For all these purposes, a range of legal and administrative techniques may be deployed, including rule making, adjudication (and other forms of dispute resolution);

inspection; and licensing.

Public functions need not be the exclusive domain of the State. Charities, self-regulatory organisations 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 'recognise 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."

19. In *VST Industries Ltd. v. Workers' Union* [(2001) 1 SCC 298 : 2001 SCC (L&S) 227] the very same question came up for consideration. The appellant Company was engaged in the manufacture and sale of cigarettes. A petition was filed by the first respondent under Article 226 of the Constitution seeking a writ of mandamus to treat the members of the respondent Union, who were employees working in the canteen of the appellant's factory, as employees of the appellant and for grant of monetary and other consequential benefits. Speaking for the Bench, Rajendra Babu, J., (as he then was), held as follows: (SCC p. 305, para 7)

"7. In *de Smith, Woolf and Jowell's Judicial Review of Administrative Action*, 5th Edn., it is noticed that not all the activities of the private bodies are subject to private law e.g. the activities by private bodies may be governed by the standards of public law when its decisions are subject to

duties conferred by statute or when, by virtue of the function it is performing or possibly its dominant position in the market, it is under an implied duty to act in the public interest. By way of illustration, it is noticed that a private company selected to run a prison although motivated by commercial profit should be regarded, at least in relation to some of its activities, as subject to public law because of the nature of the function it is performing. This is because the prisoners, for whose custody and care it is responsible, are in the prison in consequence of an order of the court, and the purpose and nature of their detention is a matter of public concern and interest. After detailed discussion, the learned authors have summarised the position with the following propositions:

(1) The test of whether a body is performing a public function, and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly a 'public' or a 'private' body.

(2) The principles of judicial review prima facie govern the activities of bodies performing public functions.

(3) However, not all decisions taken by bodies in the course of their public functions are the subject-matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:

(a) Where some other branch of the law more appropriately governs the dispute between the parties. In such a case, that branch of the law and its remedies should and normally will be applied; and

(b) where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely, that the terms of a contract will normally govern the transaction, or other relationship between the parties, rather than the general law. Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed upon by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute.”

21. Another decision on the same subject is **G.M., Kisan Sahkari Chini Mills Ltd. v. Satrugan Nishad [(2003) 8 SCC 639]** . The appellant was a cooperative society and was engaged in the manufacture of sugar. The respondent were the workers of the appellant and they filed various writ petitions contending that they had to be treated as permanent workmen. The appellant challenged the maintainability of those writ petitions and applying the principles enunciated in **VST Industries case [(2001) 1 SCC 298 : 2001 SCC (L&S) 227]** , it was held by this Court that the High Court had no jurisdiction to entertain an application under Article 226 of the Constitution as the mill was engaged in the manufacture and sale of sugar which would not involve any public function.

22. In *Federal Bank Ltd. v. Sagar Thomas* [(2003) 10 SCC 733] the respondent was working as a Branch Manager of the appellant Bank. He was suspended and there was a disciplinary enquiry wherein he was found guilty and dismissed from service. The respondent challenged his dismissal by filing a writ petition. The learned Single Judge held that the Federal Bank was performing a public duty and as such it fell within the definition of “other authorities” under Article 12 of the Constitution. The appellant Bank preferred an appeal, but the same was dismissed and the decision of the Division Bench was challenged before this Court. This Court observed that a private company carrying on business as a scheduled bank cannot be termed as carrying on statutory or public duty and it was therefore held that any business or commercial activity, whether it may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money which do have an impact on the economy of the country in general, cannot be classified as one falling in the category of those discharging duties or functions of a public nature. It was held that the jurisdiction of the High Court under Article 226 could not have been invoked in that case.

29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over

*administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, 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. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. Sometimes, it is difficult to distinguish between public law and private law remedies. According to **Halsbury's Laws of England, 3rd Edn., Vol. 30, p. 682,***

“1317. A public authority is a body, not necessarily a county council, municipal corporation or other local authority, which has public or statutory duties to perform and which perform those duties and carries out its transactions for the benefit of the public and not for private profit.”

There cannot be any general definition of public authority or public action. The facts of each case decide the point.

31. *The decision of the employer in these two cases to terminate the services of their employees cannot be said to have any element of public policy. Their cases were purely governed by the contract of employment entered into between the employees and the employer. It is not appropriate to construe those contracts as opposed to the principles of public policy and thus void*

and illegal under Section 23 of the Contract Act. In contractual matters even in respect of public bodies, the principles of judicial review have got limited application. This was expressly stated by this Court in State of U.P. v. Bridge & Roof Co. (India) Ltd. [(1996) 6 SCC 22] and also in Kerala SEB v. Kurien E. Kalathil [(2000) 6 SCC 293]. In the latter case, this Court reiterated that the interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. Whether the contract envisages actual payment or not is a question of construction of contract. If a term of a contract is violated, ordinarily, the remedy is not a writ petition under Article 226." (emphases added)

8. In the instant case, services of the appellants/petitioners have been terminated by the respondent/company. The contention of the counsel for the appellants/petitioners that the respondent/company herein is discharging a public function, cannot be accepted. The respondent/company has entered into contracts with different banks to collect currency from them and top up the ATM branches being run by them, which activity cannot be described as a public function in the light of the test laid down by the Supreme Court. Thus, the respondent/company is neither an instrumentality of the State nor is it carrying out any public function for this Court to entertain the present petition.

9. It is pertinent to mention here that on an earlier occasion also the services of certain employees of the respondent/company were terminated and they had approached the Labour Court under the Industrial Disputes Act for appropriate relief. A settlement was entered into between the Management and the Employees' Union

whereby the employees were reinstated in service. Nothing prevents the appellants/petitioners to approach the appropriate forum under the Industrial Disputes Act for redressal.

10. As for the submission made by Mr. Singh, learned counsel for the appellants/petitioners, that the respondent/company has terminated the services of his clients during the COVID-19 phase, on enquiring from learned counsel as to what are the contents of the charge sheet served on the appellants/petitioners, he states that the allegations levelled against them are that they have been tampering with the currency handed over to them for the period between April, 2019 to April, 2020 and there is a mismatch of funds. Learned counsel contents that there is no truth in these allegations and it is a ruse to throw out the appellants/petitioners from the jobs. The very fact that the charge sheet refers to a period spanning over one year commencing from April, 2019 to April, 2020 itself indicates that the action of the respondent/company of terminating the services of the appellants/petitioners has no relation with the COVID-19 pandemic, as sought to be urged by the appellants/petitioners.

11. We are also in complete agreement with the findings returned by the learned Single Judge that the termination having already come into effect there cannot be any stay thereof as prayed for by the appellants/petitioners in the writ petition.

12. Lastly, learned counsel for the appellants/petitioners states that the appellants/petitioners are not left with any remedy inasmuch as the Conciliation Officers in the Ministry of Labour have not started discharging their duties due to the lockdown. It is his contention that

the Labour Courts are not functioning in Delhi even now.

13. It is noteworthy that by an order dated 13.06.2020, the High Court had suspended the functioning of Courts subordinate to it till 30.06.2020, but w.e.f. 16.06.2020, all the subordinate courts have been directed to take up urgent cases (except where evidence is to be recorded) through Video-Conferencing mode. Nothing prevented the appellants/petitioners from approaching the Labour Court instead of filing the instant appeal. In any event, if the non-functioning of the Conciliation Officer is the grievance of the appellants/petitioners, then they ought to have sought legal recourse against the Ministry of Labour. Having failed to do so, the appellants/petitioners cannot invoke Article 226 of the Constitution of India for seeking resolution of an industrial dispute raised by them. Even otherwise, disputed questions of facts as raised in the present case, cannot be gone into in proceedings under Article 226 of the Constitution of India.

14. For all the aforesaid reasons, we do not see any reason to interfere with the impugned judgment which is upheld. We reiterate that the appellants/petitioners are at liberty to seek appropriate remedy as available to them in law. The appeal is dismissed *in limine* along with the pending application.

HIMA KOHLI, J

SUBRAMONIUM PRASAD, J

JUNE 22, 2020

AA/hsk