

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

WPA/4332/2023

Prosenjit Bank
Vs
Essar Oil Ltd. (Now Known as Nayara Energy Ltd) & Ors.

For the Petitioner: Mr. Biswaroop Bhattacharjee, Adv.,
 Mr. Sanjib Seth, Adv.

For the Respondent No. 1 to 8:
 Mr. Chandra Sekher Banerjee, Adv.,
 Mr. Shamit Dutta, Adv.,

For the Respondent No.9 to 12:-
 Mr. Arka Maiti, Adv.,
 Mr. Aniruddha Singh, Adv.

Heard on: 8 August, 2023.

Judgment on: 8 August, 2023.

BIBEK CHAUDHURI, J. : –

1. A preliminary issue of maintainability of the instant writ petition is involved here.
2. Essar Oil Company Ltd. presently known as Nayara Energy Ltd., a private limited company incorporated under the Companies Act, 1956 deals with the business of selling petroleum products like petrol, diesel etc. The said company appoints different franchisees all over India on the basis of an agreement executed by and between Essar Oil Ltd. (now known as Nayara Energy Ltd) and the individual persons. Similarly, the

petitioner being a proprietor of M/s Lakshmi Service Station, carrying on business of retail outlet for retailing of petroleum products at Ichhanagari, within Police Station Jagatballavpur, District- Howrah executed an agreement with the respondent No.1 company on 25th March, 2010 for retail sale of petroleum products. On the basis of the said agreement the petitioner has been running the said business since 25th March, 2010 uninterruptedly without violating any terms and conditions of the said agreement. It is further stated by the petitioner that since the month of March, 2020 the petitioner authorized respondent No.9, 10 and 11 to look after the said business of the petitioner temporarily due to his sickness. But the said respondents subsequently refused to hand over possession of the said business to the petitioner with mala fide intention and withheld illegally the said business keeping valuable documents under their custody. The respondents have now opened a business under the name and style of M/s Zas Enterprise. They also opened a bank account in a nationalized bank in the name of Zas Enterprise and has been making transactions by using the code of the proprietorship concern of the petitioner. Suddenly on 7th July, 2022 the respondent No.1 issued a letter to the petitioner warning him against any further violation of any clause of the Franchise Agreement dated 25th March, 2010 and also requested him to arrange for adequate working capital to ensure smooth and proper functioning of the retail outlet failing which they would initiate action against the petitioner. The petitioner prayed for some time to regularize his business but subsequently similar warning letters were issued by the

respondent No.1. He was finally granted time till 25th October, 2022 to regularize and standardize business in order to achieve sales target to be fixed by the company. Ultimately on 16th November, 2022 the respondent No.1 issued a show cause notice to the petitioner calling upon him to explain within ten days of receipt of the notice as to why the Franchise Agreement dated 25th March, 2010 shall not be terminated on account of violation of the sale agreement. Though the petitioner gave reply to the show cause notice, his retailorship was cancelled by the respondent No.1 company.

3. Respondent No.1-8 has filed an Affidavit-in-opposition controverting all allegations made by the petitioner in the writ petition. Specific case of the answering respondents is that the respondent No.1 company entered into a Franchise Agreement on 25th March, 2010 with Lakshmi Service Station. Both the respondent No.1 compnay and the proprietor of M/s Lakshmi Service Station are private parties. The Franchise Agreement is essentially a contract executed by and between the proprietor of M/s Lakshmi Service Station and the respondent No.1, being a private limited company there is no ailment of public law involved in the contractual relationship between the petitioner and respondent No.1 and therefore the instant writ petition is not maintainable. The writ petitioner has efficacious remedy in civil court and not under the writ jurisdiction. As the petitioner failed to achieve the sale target fixed by the respondent company for running its business, the petitioner was initially warned thrice. Subsequently, he was directed to give reply to the show cause

notice and finally he was terminated from service. In such view of the matter, the respondent No.1-8 contends that the instant writ petition is not maintainable. By filing an affidavit-in-reply the petitioner has refuted the allegation of non maintainability of the writ petition. Mr. Biswaroop Bhattacharjee, learned Advocate for the petitioner frankly admits that the respondent company is incorporated as a private company limited under the Companies Act, 1956. Thus, from the constitution of the Company it is a private limited company carrying on business of distribution and sale of oil products through its franchisees. However, it is submitted by the learned Advocate for the petitioner that the private oil company has no authority or independents to fix the price of petrol and diesel and other fuel products. The price is fixed by the Central Government and the oil company is exclusively owned by the Central Government. Therefore, though the petitioner is a private limited company, it has been discharging the duty of selling petroleum products at the rate fixed by the Central Government. Thus, the respondent company has been discharging public duties in the matter of selling petroleum products.

4. It is also submitted by the Mr. Bhattacharjee that in **Ajay Hasia & Ors. vs. Khalid Mujib Sehravardi & Ors.** reported in **(1981) 1 SCC 722**, the Supreme Court had the occasion to determine the circumstances when a corporation can be said to be an instrumentality or agency of the Government relying on its earlier decision in **International Airport Authority** case. The Hon'ble Supreme Court summarized the decision in

the **International Airport Authority, (1980) 3 SCC 459** in the following words:-

- i) One thing is clear that if the entire share capital of the corporation is held by Government or it would go a long way towards indicating that the corporation is an instrumentality or agency of Government.
- ii) 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.
- iii) It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected.
- iv) Existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality.
- v) 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.
- vi) Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of the inference of the corporation being an instrumentality or agency of a Government.

5. However, it is submitted by Mr. Bhattacharjee that Public Law is a realm that has developed to a great extent since the days when *Ajay Hasia's* case was decided by the Hon'ble Supreme Court. In support of his contention he refers to the decision of the Hon'ble Supreme Court in **St.**

Mary's Education Society & Anr. vs. Rajendra Prasad Bhargava & Ors.

reported in **(2023) 4 SCC 498**. It is submitted by Mr. Bhattacharjee that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if court is satisfied that the action under challenge falls within the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows:- If the person or authority is discharging public duty or public functions, their action under challenge falls in domain of public law and not under common law.

6. Mr. Bhattacharjee also refers to the well celebrated judgment of the Hon'ble Supreme Court in **Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology & Ors.** reported in **(2002) 5 SCC 111**. He specifically submits from Pradeep Kumar Biswas-

“Initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read ejusdem generis with the authorities mentioned in the definition of Article 12 itself. The next stage was reached when the definition of “State” came to be understood with reference to the remedies available against it. Thus, a statutory corporation, with regulations framed by such corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by Statute.”

“The picture that emerges from the case-law is that the tests formulated in *Ajay Hasia* case, (1981) 1 SCC 722 for determining as to when a corporation can be said to be an instrumentality or agency of the Government are not a rigid

set of principles so that if a body falls within any one of them it must, ex hyupothesi, be considered to be a State within the meaning of Article 12. The question in each case would – 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 be 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.”

7. In **K.K Sexena vs. International Commission of Irrigation and Drainage and Ors, Civil Appeal No.11499 of 2014** decided on 18th December, 2014, the Hon’ble Supreme Court in paragraph 46 and 47 held as hereunder:

“46) It is trite that contract of personal service cannot be enforced. There are three exceptions to this rule, namely: (i) when the employee is a public servant working under the Union of India or State; (ii) when such an employee is employed by an authority/ body which is a State within the meaning of Article 12 of the Constitution of India; and (ii) when such an employee is 'workmen' within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and raises a dispute regarding his termination by invoking the machinery under the said Act. In the first two cases, the employment ceases to have private law character and 'status' to such an employment is attached. In the third category of cases, it is the Industrial Disputes Act which confers jurisdiction on the labour court/industrial tribunal to grant reinstatement in case termination is found to be illegal.

47) In the present case, though we have held that ICID is not discharging any public duty, even otherwise, it is clear that the impugned action does not involve public law element and no 'public law rights' have accrued in favour of the appellant which are infringed. The service conditions of the appellant are not governed in the same manner as was the position in *Anadi Mukta Sadguru (supra)*.”

8. Having heard the learned Advocates for the petitioner as well as the respondent No.1 and on careful perusal of the decisions referred by Mr. Bhattacharjee, learned Advocate for the petitioner, it is seen that in the instant case the relation between the petitioner and the respondent No.1 is absolutely contractual. Therefore, any dispute arising of a contract which is of private nature is a civil wrong to be adjudicated upon by the competent civil court. In the instant case the contractual relation between the petitioner and the respondent No.1 does not have any public law element. The learned Advocate for the petitioner tries to establish that the respondent No.1/company discharges function of public nature because the said company is under obligation to sale petroleum products at a price fixed by the government. The company does not have any independent power to fix the price of the petroleum product. Therefore, the company discharges public function on behalf of the State. This Court is not in a position to accept such argument advanced by the learned Advocate for the petitioner. It may be a fact that the respondent company sells petroleum products at a price fixed by the Central and State Government, but the management of the company is absolutely private.

There is no control over the management of the company of either the Central Government or the State Government. The company is free to execute contract with any person and for execution of such contract the company does not require to follow the guideline required to be followed by the corporation fully owned by the Central Government, as for example IOCL, HPCL, BPCL etc.

9. For the reasons stated above, I have no other alternative but to hold that the instant writ petition is not maintainable and accordingly the writ petition is dismissed.

(Bibek Chaudhuri, J.)