

ORISSA HIGH COURT: CUTTACK

W.P.(C) No. 30107 of 2021,
W.P.(C) No. 31137 of 2021
And
W.P.(C) No. 41959 of 2021

In the matter of applications under Articles 226 and 227 of the Constitution of India.

AFR

W.P.(C) No. 30107 of 2021

Surendra Kumar Sahoo Petitioner

-Versus-

State of Odisha & others Opp. Parties

For Petitioner : Mr. P.K. Mohanty,
Senior Advocate along with
M/s. S.B. Das and
P.K. Nayak, Advocates.

For Opp. Parties : Mr. S.N. Nayak,
Addl. Standing Counsel

W.P.(C) No. 31137 of 2021

Ranjan Kumar Prusty and others
..... Petitioners

-Versus-

Chief Executive Officer, (C.E.O.),
Tata Power Central Odisha Distribution
Limited (TPCODL), BBSR and others Opp. Parties

For Petitioners : M/s. B.K. Mohanty and J. Sahu, Advocates

For Opp. Parties : None

W.P.(C) No. 41959 of 2021

Geeta Choudhury

..... Petitioner

-Versus-

The Chief Executive Officer,
Tata Power Central Odisha Distribution
Ltd (TPCODL), BBSR and another..... Opp. Parties

For Petitioner : M/s. Satyabrata Mohanty,
S.S. Mohapatra, A.K. Jena,
A.P. Rath and P. Sinha,
Advocates.

For Opp. Parties : None

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI

Date of Hearing: 18.01.2022: Date of Judgment: 24.01.2022

DR. B.R. SARANGI, J. A good number of writ petitions, having been filed against different electricity distribution companies, this Court called upon

learned counsel appearing for the petitioners in those writ petitions to address this Court with regard to their maintainability. In response, learned counsel appearing for the petitioners in the above noted three writ petitions participated in the process of hearing and addressed the Court on the question of maintainability of the writ petitions. Therefore, these three writ petitions are taken up for consideration with regard to their maintainability before this Court against the distribution companies, irrespective of the factual matrix mentioned in each of the writ petitions.

2. Mr. P.K. Mohanty, learned Senior Advocate appearing along with Mr. S.B. Das, learned counsel for the petitioner in W.P.(C) No. 30107 of 2021 contended that as the opposite party-Tata Power Northern Odisha Distribution Limited (TPNODL) performs activity of supply of electricity, which is a duty of public nature, therefore, it is a 'State' and, as such, the writ is maintainable as against TPNODL. To substantiate his contention, he has relied upon the

judgments of the apex Court in ***M/s. Zee Tele Films Ltd. and another v. Union of India and others***, (2005) 4 SCC 649 : AIR 2005 SCC 2677; ***North Eastern Electricity Supply Company of Orissa Ltd v. State of Orissa and others***, 2010 (supp.-1) OLR-919; and ***NESCO Power Engineers Association v. Managing Director, NESCO, WESCO & Director, SOUTHCO and others*** (W.P.(C) No. 9745 of 2010 disposed of on 18.04.2011).

3. Mr. Binaya Kumar Mohanty, learned counsel for the petitioner in W.P.(C) No. 31137 of 2021 supported the argument advanced by Mr. P.K. Mohanty, learned Senior Advocate appearing for the petitioner in W.P.(C) No. 30107 of 2021. He also relied on the judgment of this Court in ***National Bank for Agriculture and Rural Development (NABARD) and another v. Chita Ranjan Patnaik and others***, 126 (2018) CLT 633.

4. Mr. Satyabrata Mohanty, learned counsel appearing for the petitioner in W.P.(C) No. 41959 of 2021 also supported the contention raised by Mr. P.K. Mohanty, learned Senior Advocate appearing for the petitioner in W.P.(C) No. 30107 of 2021 and Mr. Binaya Kumar Mohanty, learned counsel for the petitioner in W.P.(C) No. 31137 of 2021. He unequivocally contended that since TPCODL is discharging the duties and responsibilities of supplying electricity to the people, is performing “public duty”. Therefore, the writ petition is maintainable against TPCODL.

5. At the outset, it is of relevance to mention here that initially the supply of electricity, including transmission, maintenance and distribution, was undertaken by Orissa State Electricity Board, a corporation created under the statute and completely regulated by the State. Subsequently, with a view to restructuring of the electricity industry for rationalization of the generation, transmission,

distribution and supply of electricity; and for avenues for participation of private sector entrepreneurs in the electricity industry in the State in an efficient, economic and competitive manner, including the constitution of Electricity Regulatory Commission for the State and for the matters connected therewith and incidental thereto, the State Government, in exercise of the powers conferred under Sub-section (5) of Section 23 read with Section 55 of the Orissa Electricity Reforms Act, 1955 (Orissa Act 2 of 1996) as amended by the Orissa Electricity Reforms (Amendment) Ordinance, 1998 (Orissa Ordinance No. 3 of 1998) and after consultation with the Grid Corporation of Orissa Limited, made the transfer scheme rules, for the purpose of providing and giving effect to preparation and implementation of a scheme for the transfer of distribution undertakings of the Grid Corporation of Orissa Limited to the distribution companies, called "Orissa Electricity Reform (Transfer of undertakings, Assets, Liabilities, Proceedings and

Personnel of Gridco to Distribution Companies) Rules, 1998 (hereinafter to be referred as “Rules, 1998”).

Accordingly, the entire State of Odisha was divided into four distribution zones/areas for supply of electricity and incorporated four distribution companies, namely, WESCO, NESCO, CESCO and SOUTHCO. As such they were performing the essential public duty and also executing schemes sponsored by the Central and the State Government. These companies came into existence as per the Rules, 1998 and were entrusted with the task of spending the Central and State Government assistance, while executing such schemes. Those four distribution companies were in charge of collection of electricity duty, which is government revenue, along with the energy charges, collected from the customers. They were subsidiary of GRIDCO, a wholly owned company of the State Government, which holds 49% share and, therefore, those companies were funded by the State Government through the share held by the

GRIDCO. More so, various schemes like Accelerated Power Development & Reform Programme (APDRP) and Minimum Need Programme (MNP) etc. were carried out by those distribution companies, for which funds were provided by the State Government for electrification work in the State.

6. For a just and proper adjudication of the maintainability issue, the factual matrix of W.P.(C) No. 30107 of 2021, which is essential only for the purpose of deciding the issue of maintainability, is referred to herein below.

7. North Eastern Electricity Supply Company of Odisha Limited (NESCO), which is one of the four above named distribution companies and whose against WP(C) No. 30107 of 2021 has been preferred, was incorporated on 19th November, 1997 under the Companies Act, 1956. Pursuant to the Odisha Electricity Reforms Act 1995 and Odisha Electricity Reforms Rules, 1998, all the assets of GRIDCO

pertaining to the distribution business in the Northern Zone of GRIDCO comprising districts of Balasore, Mayurbhanj, Keonjhar, Jajpur, and Bhadrak were transferred to NESCO. On 1st April, 1999, 51% (fifty one percent) shares of GRIDCO in NESCO were transferred to BSES Limited selected through competitive bidding process. NESCO continued to be managed by BSES Limited and later by its successor R-Infra Limited. Under Section 19 of the Electricity Act, 2003 (the "Act, 2003"), the Commission revoked license of NESCO with effect from March, 2015 and appointed CMD, GRIDCO as the Administrator under Section 20(d) of Act, 2003 and vested the management and control of NESCO Utility along with their assets, interests and rights with the CMD, GRIDCO Limited. The order on revocation of licenses by the Commission was upheld by the APTEL in Appeal No. 64 of 2015 and also confirmed by the apex Court vide order dated 24.11.2017 in Civil Appeal No.18500 of 2017. In terms of Section 20 of Act, 2003, the Commission initiated a

transparent and competitive bidding process for selection of an investor for sale of utility of NESCO and had issued the updated Request for Proposal (“RFP”) on 31.07.2020. In response to the said RFP, single bid was received by due date. After detailed evaluation by independent bid evaluation committee set up by the Commission, Tata Power Company Limited (“TPCL”) was recommended as the successful bidder and Commission accepted the same under Section 20(1)(a) of the Act, 2003. Thereafter, the Commission issued a Letter of Intent (the “LoI”) to TPCL vide letter dated 29.01.2021. TPCL communicated the acceptance of the LoI vide letter dated 05.02.2021.

8. As per the terms of the RFP, upon completion of sale, NESCO Utility shall vest in a Special Purpose Vehicle (“Project SPV” or “Operating Company”) in which TPCL shall hold 51% (fifty one percent) equity shares and Government of Odisha shall hold 49% (forty nine percent) equity shares

through GRIDCO. The Commission, vide letter dated 29.01.2021, directed GRIDCO to incorporate the SPV, to which the utility of NESCO shall be vested and license of NESCO Utility shall be transferred. TP Northern Odisha Distribution Limited (“TPNODL”) will be incorporated as a wholly owned subsidiary of GRIDCO with an authorized share capital of Rs. 1000 crores (Indian Rupee One thousand crores) only and paid-up capital of Rs. 5 lakhs (Indian Rupee Five lakhs) only. TPNODL shall be the SPV, in which TPCL and GRIDCO shall hold 51% (fifty one percent) and 49% (forty nine percent) equity shares respectively after the completion of sale. The Commission, vide letter dated 29.01.2021, provided GRIDCO/ OPTCL the RFP Documents namely – Share Acquisition Agreement, Shareholders Agreement, Bulk Supply Agreement and Bulk Power Transmission and SLDC Agreement for execution by concerned parties. TPCL quoted a purchase price of Rs. 375 crores (Indian Rupee Three hundred seventy five crores) in its

financial bid in response to the RFP for 100% (one hundred percent) equity in the SPV. TPCL is required to pay 51% (fifty one percent) of the purchase price of Rs. 375 crores (Indian Rupee Three hundred seventy five crores) quoted in its bid. As per terms of RFP, this amount is required to be deposited by TPCL with the Commission. The Commission, vide letter dated 29.01.2021 (LoI), had directed TPCL to submit the Performance Guarantee and deposit the amount equivalent to 51% (fifty one percent) of the purchase price with the Commission. In compliance thereto, TPCL vide letter dated 10.03.2021 communicated that they have deposited Rs.191.25 (Indian Rupee One ninety one crore and twenty five lakhs only) with the Commission which is 51% of the bid amount of Rs. 375 crore and submitted the Performance Guarantee of Rs. 150 crores (Indian Rupee One hundred fifty crores) as per the directions of the Commission.

9. As a consequence thereof, TPNODL has come to existence and carrying on business of

distribution of electricity in the northern part of the State of Orissa. Similarly, in the other parts of the State, TPCL has also entered into the agreement and engaged in the business of distribution of electricity. As per the terms of the RFP, upon completion of sale, the earlier distribution company shall vest in a SPV, in which TPCL shall hold 51% (fifty one percent) equity shares and Government of Odisha shall hold 49% (forty nine percent) equity shares through GRIDCO. In view of the provisions of Section 21(a) of the Act, 2003, the utility of NESCO shall be vested in TPNODL with effect from 01.04.2021. As a consequence thereof, the license, the rights and responsibilities of NESCO utility transferred to TPNODL with effect from 01.04.2021, pursuant to the vesting order dated 25.03.2021 passed by the Orissa Electricity Regulatory Commission in Case No. 9/2021. The vesting order dated 25.03.2021 also clarifies with regard to the management, funds and control over the distribution company by the State Government

through GRIDCO. The petitioner in W.P.(C) No. 30107 of 2021 files an affidavit on 09.11.2021 placing the vesting order dated 25.03.2021 on record and thereafter by way of a memo filed on 13.12.2021 placed on record the Shareholders Agreement between GRIDCO Limited and The Tata Power Company Limited and TPNODL dated 1st day of April 2021, the Share Acquisition Agreement between GRIDCO Limited and The Tata Power Company Limited and TPNODL dated 1st day of April, 2021 and Bulk Supply Agreement between GRIDCO Limited and TPNODL dated 1st day of April, 2021.

10. Shareholders agreement dated 1st April, 2021 clearly signifies its utility and responsibility and also deals with its objective under Article 2. Article-4 thereof deals with the Management of TPNODL- Directors, Chairman, Managing Director/ Manager. Clause-4.1, 4.2 and 4.3 of Article-4, being relevant, are extracted herein below:-

“4.1 The Board of Directors of TPNODL shall consist of the nominees of the respective parties, i.e. GRIDCO and TPCL in proportion to the shares held by them. For as long as each of GRIDCO and TPCL is the registered shareholders of ten percent (10%) or more of the shares it shall be entitled to appoint one Director of TPNODL for each tranche of ten percent (10%) of the Shares of which it is the registered holder at the relevant time and to remove and replace such Director.

4.2 Given the shareholding of fifty one percent (51%) by TPCL and forty nine percent (49%) by GRIDCO, the Board of TPNODL shall consist of nine (9) Directors nominated by Shareholders. TPCL shall be entitled to nominate five (5) Directors whereas GRIDCO shall be entitled to nominate four (4) Directors. The Directors nominated by GRIDCO may include all or any one from among the Chairman of GRIDCO, the Principal Secretary, Department of Energy, Government of Odisha and the Chief Secretary, Government of Odisha as decided by the Government of Odisha.

4.3 Any one from among Chairman of GRIDCO or the Principal Secretary, Department of Energy, Government of Odisha or the Chief Secretary, Government of Odisha, who are nominated as Directors by GRIDCO, shall be the Chairman of the Board of Directors as decided by the Government of Odisha. The Parties may also mutually agree to appoint an eminent person, who is appointed as an independent Director on the Board, as the Chairman of the Board. In the absence of the Chairman of the Board at any of the Board meetings, the members personally present at such meeting shall elect one of the Directors nominated by the GRIDCO to be the Chairman, on a show of hands, to preside over such meeting.”

Article 5 deals with Business of TPNODL; Article 6 deals with funding; Article 7 deals with matters requiring consent of both parties; Article 8 deals with

the financial policy, accounts and audit; Article 13 deals with termination; and Article 18 deals with Mutual Cooperation.

11. Similarly, in Share Acquisition Agreement dated 1st April, 2021 it has been clearly specified at Clause 1.2 (a) that all references in this agreement to statutory provisions shall be construed as meaning and including references to any statutory modification, amendment, consolidation or re-engagement made after the date of this agreement and for the time being in force. Thereby, the law which is applicable has given effect to by virtue of this agreement.

12. Even in the Bulk Supply Agreement dated 1st April, 2021, it is provided that they are also to be regulated under the provisions of the law and in definitions, it has also been specified that “Act” means Electricity Act, 2003. Thereby, TPNODL is regulated and guided by the existing Acts, Rules and Regulations framed for distribution of electricity.

13. The petitioner in W.P.(C) No. 30107 of 2021 has also filed a memo on 18.01.2022 bringing on record, the notifications nominating the Directors on behalf of GRIDCO in the Board of Directors of TPNODL, TPWODL, TPSODL and TPCODL and also incorporated the Memorandum of Association of TPNODL and Article of Association of TPNODL. On perusal of the Notification dated 31st March, 2021, it is made clear that the Principal Secretary to Government, Energy Department, Chairman, GRIDCO and Managing Director, GRIDCO are nominated as the Directors to the Board of Directors of TPNODL, but subsequently in place of Chairman, GRIDCO, the Managing Director has been included to the Board of Directors by notification dated 24.05.2021. Thereby there is a pervasive control of the State over the Management of TPNODL.

14. In the Memorandum of Association, Clause III (b) deals with matters which are necessary for

furtherance of the objects specified in Clause 3 (a),
sub-clause (1) of which reads thus-

“1. To enter into any arrangement with the government of India or the Government of Odisha, the Orissa Electricity Regulatory Commission (“OERC”) or any Local or State Government or with authorities, national, local, municipal or otherwise or with any person for the purpose of directly or indirectly carrying out the objects or furthering the interest of the Company or its members and to obtain from any such Government, State Authority, the OERC or other persons any licenses, charters, subsidies, loans, indemnities, grants, contracts, decrees, rights, sanctions, privileges, permissions, consents, approvals or concessions whatsoever, (whether statutory or otherwise) which the Company may think it desirable to obtain and to carry out exercise and comply with the same and to do anything which the Company is authorized or required to do under or by virtue of any licence granted to the Company by the OERC for attainment of its objects.”

15. In the Article of Association, it has been clarified a public company means a company which is not a private company and that a company, which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its

articles. Clause-89 thereof deals with Shareholders'

Agreement Provisions, which reads as follows:-

"The provisions of the Shareholders' Agreements dated April 01, 2021 among the Company, The Tata Power Company Limited and GRIDCO Limited (as amended from time to time) ("Shareholders' Agreement"), a copy of which is attached as Annexure A, shall form an integral part of the Articles of Association of the Company, which thereby means that in the event of any conflict or inconsistency, between Articles 1-88 of these Articles of Association and the Shareholders' Agreement, the provisions of the Shareholders' Agreement will be followed."

16. Before advertent to the core issue, it is required to take a look at Articles 12 and 226 (1) of the Constitution of India, which read as under :

"12. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

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"226. (1) Power of High Courts to issue certain writs:- (1) Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

17. In Article 12, the 'State' has not been defined. It is merely an inclusive definition. It includes all other authorities within the territory of India or under the control of the Government of India. It does not say that such other authorities must be under the control of the Government of India. The word 'or' is disjunctive and not conjunctive. Similarly, Article 226 (1) envisages that the power of the High Court to issue certain writs to 'any person' or 'authority' including in appropriate cases to any Government within the territories for enforcement of rights conferred by Part III and for any other purpose.

18. The expression 'authority' has a definite connotation. It has different dimensions and, thus, must receive a liberal interpretation to arrive at a conclusion, as to which "other authorities" could come within the purview of Article 12 or the meaning of the word 'authority' as mentioned in Article 226 (1).

19. The term “other authorities” contained in Article 12 is not to be treated as ejusdam generis. Similarly, the word ‘authorities’, as mentioned in Article 226 of the Constitution, has to be taken into consideration for adjudication of the matter itself.

20. In “**Concise Oxford English Dictionary**”, 10th Edition, the word ‘authority’ has been defined as under :

"1. the power or right to give orders and enforce obedience. 2. a person or organization exerting control in a particular political or administrative sphere. 3. the power to influence others based on recognized knowledge or expertise."

21. According to **Corpus Juris Secundum** (at p.1290), the following are the meanings of the term ‘authority’:

"In its broad general sense, the word has been defined as meaning control over; power; jurisdiction; power to act, whether original or delegated. The word is frequently used to express derivative power; and in this sense, the word may be used as meaning instructions, permission, power delegated by one person to another, the result of the manifestations by the former to the latter of the formers consent that the latter shall act for him, authority in this sense in the laws of at least one state, it has been similarly used as designating or meaning an agency for the

purpose of carrying out a state duty or function; some one to whom by law a power has been given.”

“Authority, as the word is used throughout the Restatement, is the power of one person to affect the legal relations of another by acts done in accordance with the others manifestations of consent to him; an agency of one or more participating governmental units created by statute for specific purpose of having delegated to it certain functions governmental in character; the lawful delegation of power by one person to another; power of agent to affect legal relations of principal by acts done in accordance with principals manifestations of consent to him.”

The above meaning of ‘authority’ has been referred to in ***Steel Authority of India Ltd V. National Union Waterfront Workers***, (2001) 7 SCC 1.

22. From the above meaning, there are three different concepts which exist for determining the question which fall within the expression ‘authorities’.

(i) The Corporations and the Societies created by the State for carrying on its trading activities in terms of Article 298 of the Constitution where for the capital, infrastructure, initial investment and financial aid etc. are provided by the State and it also exercises regulation and control there over.

(ii) Bodies created for research and other developmental works which is otherwise a governmental function but may or may not be a part of the sovereign function.

(iii) A private body is allowed to discharge public duty or positive obligation of public nature and furthermore is allowed to perform regulatory and

controlling functions and activities which were otherwise the job of the government.

23. There cannot be same standard or yardstick for judging different bodies for the purpose of ascertaining as to whether it fulfills the requirements of law therefor or not.

24. What is necessary is to notice the functions of the Body concerned. A 'State' has different meanings in different context. In a traditional sense, it can be a body politic but in modern international practice, a State is an organization which receives the general recognition accorded to it by the existing group of other States. Union of India recognizes the Board as its representative. The expression "other authorities" in Article 12 of the Constitution of India is 'State' within the territory of India as contradistinguished from a State within the control of the Government of India. The concept of State under Article 12 is in relation to the fundamental rights guaranteed by Part-III of the Constitution and

Directive Principles of the State Policy contained in Part-IV thereof. The contents of these two parts manifest that Article 12 is not confined to its ordinary or constitutional sense of an independent or sovereign meaning so as to include within its fold whatever comes within the purview thereof so as to instill the public confidence in it.

25. Article 12 must receive a purposive interpretation as by reason of Part III of the Constitution a charter of liberties against oppression and arbitrariness of all kinds of repositories of power have been conferred ▪ the object being to limit and control power wherever it is found. A body exercising significant functions of public importance would be an authority in respect of these functions. In those respects it would be same as is executive government established under the Constitution and the establishments of organizations funded or controlled by the Government.

26. It is not that every body or association which is regulated in its private functions becomes a 'State'. What matters is the quality and character of functions discharged by the body and the State control flowing therefrom.

The development of law in this field is well-known. At one point of time, the companies, societies etc. registered under the Indian Companies Act and Societies Registration Act were treated as separate corporate entities being governed by its own rules and regulations and, thus, held not to be 'States' although they were virtually run as department of the Government, but the situation has completely changed. Statutory authorities and local bodies were held to be States in **Rajasthan State Electricity Board, Jaipur Vs. Mohan Lal & Ors.** (1967) 3 SCR 377 : AIR 1967 SC 1857.

27. The concept that all public sector undertakings incorporated under the Indian

Companies Act or Societies Registration Act or any other Act for answering the description of 'State' must be financed by the Central/State Government and be under its deep and pervasive control has in the past three decades undergone a sea change. The thrust now is not upon the composition of the body but the duties and functions performed by it. The primary question which is required to be posed is whether the body in question exercises "public function".

28. The expansion in the definition of 'State' is not to be kept confined only to business activities of Union of India or other State Governments in terms of Article 298 of the Constitution of India but must also take within its fold any other activity which has a direct influence on the citizens.

29. In **Rajasthan Electricity Board** (supra), the Constitution Bench of the Apex Court considered the question whether the Electricity Board - which was a Corporation constituted under a statute

primarily for the purpose of carrying on commercial activities could come within the definition of 'State' in Article 12. After considering earlier decisions, it was said:

"These decisions of the Court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities".

30. It followed that since a Company incorporated under the Companies Act is not formed statutorily and is not subject to any statutory duty vis-a-vis an individual, it was excluded from the purview of '**State**'. In **Praga Tools Corporation V. Shri C.A. Imanual & Ors.**, (1969) 1 SCC 585 : (1969) 3 SCR 773, where the question was whether an application under Article 226 for issuance of a writ of mandamus would lie impugning an agreement arrived at between a Company and its workmen, the Court held that:

"[T]here was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a

mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company".

31. In **Rajasthan SEB** (supra), the Constitution

Bench of the apex Court has held as follows:-

"The expression 'other authorities' in Art. 12 is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India. The expression 'other authorities' will include all constitutional or statutory authorities on whom powers are conferred by law.

32. In **Sukhdev Singh & Ors. v. Bhagatram**

Sardar Singh Raghuvanshi & Ors, (1975) 1 SCC

421 : 1975 SCC, by following the said ratio, the apex

Court noted that the concept of 'State' in Article

12 had undergone "drastic changes in recent years".

The question in that case was whether the Oil and

Natural Gas Commission, the Industrial Finance

Corporation and the Life Insurance Corporation each

of which were public corporations set up by statutes

were authorities and therefore within the definition of

State in Article 12. The Court affirmed the decision in **Rajasthan State Electricity Board** (supra) and held that the Court could compel compliance of statutory rules. But the majority view expressed by A.N. Ray, CJ also indicated that the concept would include a public authority which:

“is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for the benefit of the public and not for private profit. Such an authority is not precluded from making a profit for the public benefit”.

33. The tests propounded by Mathew, J in **Sukhdev Singh** (supra) were elaborated in **Ramana Dayaram Shetty v. International Airport Authority of India**, (1979) 3 SCC 489 : AIR 1979 SC 1628 and were re-formulated two years later by a Constitution Bench in **Ajay Hasia v. Khalid Mujib Sehravardi**, (1981) 1 SCC 722. What may have been technically characterised as ‘obiter dicta’ in **Sukhdev Singh** and **Ramana** (since in both cases the ‘authority’ in fact involved was a statutory corporation), formed the ratio decidendi of **Ajay Hasia**.

34. In **Ajay Hasia** (supra), the Constitution Bench summarized the relevant tests gathered from the decision in **R.D.Shetty** for determining whether an entity is a 'State' or "instrumentality of the State" 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.*
- (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.*
- (3) *It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred 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 classified the corporation as a 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."*

It was held in **Ajay Hasia** that if on consideration of the relevant factors, it is found that the Corporation is

an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority's case, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12. The same view has also been taken into consideration by the apex Court in **U.P. Warehousing Corporation v. Vijay Narain**, AIR 1980 SC 840.

35. On the same day that the decision in **Ajay Hasia** was pronounced came the decision of **Som Prakash Rekhi v. Union of India**, (1981) 1 SCC 449: AIR 1981 SC 212. Here too, the reasoning in **Ramana** was followed and Bharat Petroleum Corporation was held to be a "State" within the "enlarged meaning of Art.12". **Sabhajit Tewary v Union of India** (1975) 1 SCC 485 : AIR 1975 SC 1329 was criticised and distinguished as being limited to the facts of the case.

It was said:

"The rulings relied on are, unfortunately, in the province of Art.311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C.J., rejected the argument that merely because the Prime Minister was the President or that the other

members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in Airport Authority case the composition of the Government Body alone may not be decisive. The laconic discussion and the limited ratio in Tewary hardly help either side here."

36. In **Tekraj Vasandi alias Basandi v. Union of India** , AIR 1988 SC 469 (paragraphs 17-A and 20), it is held that the expression 'authority' in its etymological sense means a body invested with power to command or give an ultimate decision, or enforce obedience, or having a legal right to command and be obeyed. But in paragraph 20 the Court observed as follows:

"In a Welfare State, as has been pointed out on more than one occasion by this Court, Governmental control is very pervasive and in fact touches all aspects of social existence in the absence of a fair application of the tests to be made, there is possibility of turning every non- governmental society into agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality."

37. In **Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani**, (1989) 2 SCC 69, the apex Court held as follows:-

"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as Government aid. Public money paid as Government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like Government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. * So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

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17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means every body which is created by statute - and whose powers and duties are defined by statute. So Government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities'. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Court to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any

person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose'.

* * *

19. *The term 'authority' used in Article 226, in the context, must receive a liberal meaning like the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art.32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. 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. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."*

38. In para 15 of **Andi Mukta Sudguru** case, the Court spelled out two exceptions to the writ of mandamus, viz. (i) if the rights are purely of a private character, no mandamus can issue; and (ii) if the management of the college is purely a private body "with no public duty", mandamus will not lie. The Court clarified that since the Trust in the said case was an aiding institution, because of this reason, it discharges public function, like Government

institution, by way of imparting education to students, more particularly when rules and regulations of the affiliating University are applicable to such an institution, being an aided institution. In such a situation, held the Court, the service conditions of academic staff were not purely of a private character as the staff had super-aided protection by University's decision creating a legal right and duty relationship between the staff and the management.

39. Further, the Court explained in para 20 of **Andi Mukta Sudguru** case that the term “authority” used in Article 226, in the context, would receive a liberal meaning unlike the term in Article 12, inasmuch as Article 12 was relevant only for the purpose of enforcement of fundamental rights under Article 31, whereas Article 226 confers power on the High Courts to issue writs not only for enforcement of fundamental rights but also non-fundamental rights. What is relevant is the dicta of the Court that 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 exigible to Article 226.

40. In **Chandra Mohan v. NCERT**, AIR 1992 SC 76, in paragraph-3, the apex Court held as follows:

"It must not be lost sight of that in the modern concept of Welfare State, independent institution, corporation and agency are generally subject to State control. The State control does not render such bodies as "State" under Art.12. The State control, however, vast and pervasive is not determinative. The financial contribution by the State is also not conclusive. The combination of State aid coupled with an unusual degree of control over the management and policies of the body and rendering of an important public service being the obligatory functions of the State may largely point out that the body is "State"."

41. The tests, which have been determined in **Ajay Hasia** (supra), are also held not rigid set of principles so that a body falling within any one of them must be considered to be 'State'. The question in case would be: whether on facts, the body is financially, functionally and administratively

dominated by or under the control of Government and such control must be particular to that body and must be pervasive. Therefore, the decision in **Sabhaijit Tewary** (supra) has been overruled by the 7 Bench judgment of the apex Court in **Pradip Kumar Biswas v. Indian Institute of Chemical Biology**, (2002) 5 SCC 111 and the apex Court by over- ruling **Sabhaijit Tewary** (supra) held as follows:

“(1) simply, by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of " other authorities" in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to the public. Further, the statute creating the entity should have been vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people- their rights, duties, liabilities or other legal relations. It created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavor and clear indicia of power- constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an

*authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in **Ajay Hasia** enable determination of governmental ownership or control. Tests 3, 5 and 6 are "functional" tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Therefore, the question whether an entity is an "authority" cannot be answered by applying **Ajay Hasia** tests.*

*(2) The tests laid down in **Ajaya Hasia** case relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in the positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned."*

42. In **Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam and another**, AIR 2005 SC 411, taking into consideration **Pradip Kumar Biswas** (supra), the apex Court has held that 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'.

43. In **Zee Telefilms Ltd. and another v Union of India and others**, (2005) 4 SCC 649, the majority view of the apex Court, referring to the guidelines laid down in **Pradeep Kumar Biswas** (supra), held that for a body to be a part of 'State' under Article 12 are:-

(1) *Principles laid down 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.*

(2) *The Question in each case will have to be considered on the bases of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by or under the control of the Government.*

(3) *Such control must be particular to the body in question and must be pervasive.*

(4) *Mere regulatory control whether under statute or otherwise would not serve to make a body a State.*

The facts established in the said case shows the following :-

1. *Board is not created by a statute.*
2. *No part of the share capital of the Board is held by the Government.*
3. *Practically no financial assistance is given by the Government to meet the whole or entire expenditure of the Board.*
4. *The Board does enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected.*
5. *There is no existence of a deep and pervasive State control. The control if any is only regulatory in nature as applicable to other similar bodies. This control is not specifically exercised under any special statute applicable to the Board. All functions of the Board are not public functions nor are they closely related to governmental functions.*
6. *The Board is not created by transfer of a Government owned corporation. It is an autonomous body.*

To these facts, applying the principles laid down by seven Judge Bench in **Pradeep Kumar Biswas** (supra), it would be clear that the facts established do not cumulatively show that the Board is financially, functionally or administratively dominated by or is under the control of the Government. Thus the little

control that the Government may be said to have on the Board is not pervasive in nature. Such limited control is purely regulatory control and nothing more.

With the majority view of the apex Court, it was held that when a private body exercises its public functions even if it is not a part of the 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. Therefore, merely because a non- governmental body exercises some public duty that by itself would not suffice to make such body a part of the State for the purpose of Article 12.

Thereby, the BCCI does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to the public duties or State functions and if there is any violation of any constitutional or

statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a part of the State. Under the Indian jurisprudence there is always a just remedy for violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution which is much wider than Article 32.

44. In **K.K. Saksena v. International Commission on Irrigation & Drainage and others**, (2015) 4 SCC 670, the apex Court held as follows:-

“The term “authority” used in Article 226 to be more liberally interpreted that same term used in Article 12 since Article 12 is relevant only for enforcement of fundamental rights, while Article 226 confers power on High Courts to issue writs for enforcement of non-fundamental rights also. Thereby, it is held even if a person or authority does not come within the sweep of [Article 12](#) of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under

liability to discharge any function under any statute, to compel it to perform such a statutory function.”

45. In **North Eastern Electricity Supply Company of Orissa Ltd.** (supra), this Court has come to a conclusion that the said 4 distribution companies are governed by the different rules and regulations framed by the State Government, for supply and distribution of electricity in the State of Orissa under the Electricity Act, 2003 and Orissa Electricity Reform Act, 1995, the performance of the distribution companies and the rate of tariff to be collected by them and regulated by OERC. Moreover, the 4 distribution companies, including the petitioner company, are discharging governmental functions of distribution and supply of electricity to the people of the State, which is an essential public duty. Thereby, held that company is a “public authority” and, therefore, fall within the definition of “public authority” as defined in the RTI Act.

46. In **NABARD** (supra), this Court had come to a conclusion that taking into account the nature of constitution of NABARD and discharge of its duties and keeping in view the parameters provided in the cases of Dr. S.L. Agarwal, Ajay Hasia and Pradeep Kumar Biswas, NABARD can be construed as a 'State' within the meaning of Article 12 of the Constitution of India, being an instrumentality of the State and an 'authority'. Thus, writ application against NABARD is maintainable.

47. In **NESCO Power Engineers Association** (supra), which is an unreported judgment, this Court held that the opposite parties are the creatures of the Statute of 1995 and the distribution companies are public utility companies formed under the Orissa Electricity Reforms Act, 1995 to discharge the statutory functions and their functions are also for the general public, meaning thereby, their public duty is to supply power to the consumers in the State of Orissa. Hence, they come under the definition of

Articles 12 and 226 of the Constitution of India.

Therefore, the writ petitions are maintainable.

48. In view of the foregoing discussions, it is made clear that though TPCL is a company, but it has indulged in distribution of electricity in four distribution areas of the State in different names, such as, TPNODL, TPWDL, TPSODL and TPCODL, and, thereby, discharging the public duty and, as such, its management is also controlled by the State through GRIDCO. Therefore, TPCL can be said to be an “authority” within the meaning of Article 226 of the constitution of India.

49. On conspectus of the facts available on record and the propositions of law, as discussed above, it can be safely held that the distribution companies like TPNODL, TPWDL, TPSODL and TPCODL, in which the Government through GRIDCO has got 49% of equity share, whereas as TPCL has got 51% of equity share, are discharging their functions

under the Statute and the activities undertaken by them are in the nature of a public duty. Therefore, they are coming within the meaning of ‘authority’ under Article 226 of the Constitution of India, if not as ‘State’ as prescribed under Article 12 of the Constitution of India, and otherwise satisfy the requirement of the law and thereby it can be held that writ petitions are maintainable against those distribution companies.

50. Accordingly, all the writ petitions be segregated and listed before the assigned bench under appropriate heading for disposal on their own merits.

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DR. B.R. SARANGI,
JUDGE

Orissa High Court, Cuttack
The 24th January, 2022, ARUN/GDS