**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**

**Manikant Pathak and ors. Vs. State of Bihar and ors.**

**Manikant Pathak and ors. Vs. State of Bihar and ors.**

**SooperKanoon Citation** : sooperkanoon.com/133992

**Court** : Patna

**Decided On :** Mar-19-1997

**Judge** : D.P. Wadhwa, C.J., S.N. Jha and S.J. Mukhopadhaya, JJ.

**Appeal No.** : C.W.J.C. No. 5015 of 1996

**Appellant** : Manikant Pathak and ors.

**Respondent** : State of Bihar and ors.

**Advocate for Pet/Ap.** : Mr. Umesh Prasad Singh

**Disposition** : Petitions Dismissed

**Judgement** :

**S.N. Jha, J.**

1. A significant question of law arises for decision in these two writ petitions-whether the State Government is liable to pay the salary and allowances of a Government company.

2. In C.W.J.C. No. 1718 of 1994 the petitioners are the employees of the Bihar Finished Leathers Limited, a subsidiary company of the Bihar Leather Industries Development Corporation Ltd. In C.W.J.C. No. 5015 of 1986 the petitioners are the employees of the Bihar State Agro industries Development Corporation Ltd. They, in substance, seek direction to the concerned Corporation for payment of

salary etc. and further direction to the State Government to make sufficient fund available to them (Corporations) to facilitate payment. Since the writ petitions involved pure question of law, it is not necessary to set out the factual details of the cases.

3. The respondents do not deny that the petitioners or, indeed, other employees of the two Corporations are entitled to payment of salary etc. While the Corporations have taken the plea of non availability of the adequate fund-generated either from its own resources or made available by the Government, the stand of the State is that the petitioners are the employees of the Corporations, which are companies incorporated under the Companies Act and the Government can not be fastened with the liability.

4. Mr. Umesh Prasad Singh, learned Counsel for the petitioners, contended that the mere fact that the Bihar Finished Leathers Limited or the Bihar Agro industries Development Corporation Ltd. are incorporated under the Companies Act, is not conclusive of the question of liability of the State, for it is the State which is carrying on the trade and business in the grab of a company and, therefore, the ultimate liability rests with it. He submitted that Article 298 of the Constitution of India envisages and permits the Union and the States to carry on trade or business, acquire, hold and dispose of property and make contracts for any purpose. The only rider is that in case of the States, if the purpose is one with respect the which Parliament is competent to make laws, the exercise of such executive power is subject to legislation by the Parliament and vice versa. In other words, the executive power of the Union and the States extends to carrying on trade and business etc. even with respect to matters which fall within the competence of the State legislature or the Parliament, respectively and until and unless legislation is made by either Parliament or State legislature, as the case may be, neither the Union of India can restrain the States from carrying on trade and business with respect to any matter falling within their competence not the Sates can restrain Union of India from doing so with respect to matters falling within their domain. Reference was made in this connection to H. Anraj and ors. v. State of Maharashtra : [1984]2SCR440 .

5. Mr. Umesh Prasad Singh submitted that Article 298 does not contemplate that trade or business is to be carried on or property is to be acquired, held or disposed of or the contracts are to be made only through the Departments of the Government. According to the counsel, it is open to the Government to carry on trade or business etc. either directly through Departments of the Government or form company and do the same through it. And where it is found that the control of the State or Union, as the case may be, is all-pervasive, no distinction can be made between carrying on trade or business directly through Department or doing the same through at Government company. Counsel in this connection referred to the Rules of Executive Business framed under Article 166(3) of the Constitution by the Governor of Bihar. Pointed reference was made to Rule 5 of the said Rules which lays down that, 'the business of the Government shall be transacted in the Departments specified in the First Schedule and shall be classified and distributed between those Departments as laid down therein'. It was pointed out that the Bihar State Leather Industries Development Corporation and Bihar State Finished Leathers Limited find mention in the First Schedule under the Small Scale Industries Department. Similarly, the Bihar Agro Industries Development Corporation finds mention in the Schedule under the Agriculture Department. It was, accordingly, submitted that the business relating to the aforesaid corporations/companies have been described by the State Government itself as 'the business of the Government' and the State, therefore, can not take any different stand when it comes to determining its liability in matters relating to the said Corporations. On these premises it was contended that the Public Corporations or the Companies incorporated under the Companies Act are the agencies of the State. Such corporations and the companies have been formed discharging governmental functions for the purpose of carrying on trade or business etc., as envisaged and permitted under Article 298 of the Constitution. According to the counsel further, carrying on trade or business through Public Corporation or Company, instead of directly through the Departments may be a matter of expediency or convenience which either as regards the nature of the function or as regards the liability and obligation makes no difference. Section 617 of the Companies Act merely lays down the procedure regarding formation of Government company and enables the Government to carry on trade or business

for effectuating the objects contemplated under Article 298.

6. Another line of argument of Mr. Umesh Prasad Singh is that the Public Corporations and the Government companies are not only the agencies and instrumentality of the State but their employees also hold civil posts. -And although they are not entitled to the protection envisaged under Article 311 of the Constitution, they are entitled to the protection of the provisions of Part III and Part IV of the Constitution. The State being the principal employer can not disown the liability of it agency or instrumentality created by it. Counsel took pains to refer to different provisions of the Article of Association of the two companies in question to highlight the extent of the executive and financial powers of the State including the power of the State including the power to create posts, regulate appointment, fix the pay structure etc. of the employees through the Bureau of Public Enterprises. In support of these submissions Mr. Singh placed reliance on Central Inland Water Transport Corporation Limited and Anr. v. Brojo Nath Ganguly and Anr. : (1986)IILLJ171SC .

7. On behalf of the respondent-State learned Advocate General submitted that there is distinction between Corporation created by the statute and Corporation/Company incorporated under the Companies Act. While the former depending on the facts of the particular case and the concerned statutory provisions, may be called agent of the State, a Corporation or company engaged in trade or business, acting on its own, can not be called the agent of the State irrespective of the nature or degree of control by the Government department and their employees cannot be called the employees of the State so as to bind the State Government and make it liable for payment of salary etc. He relied on heavy Engineering Mazdoor Union v. State of Bihar : (1969)IILLJ549SC . Learned Advocate General agreed that in view of the changing concepts it is open to the Courts to lift the veil of corporateness where questions of control are in issue but according to him, the veil of corporateness can be lifted only in certain cases which have been enumerated in Paragraph 18.22 of Chapter XVIII of Palmer's Company Law, 23rd Edition (Pages 201-205). Since in the present case none of the situations is attracted, it is futile to make any attempt to lift the so called veil.

8. The decision in Central Inland Water Transport Corporation v. Brojo Nath Gangul (supra ) has little relevance in this case. In that case services of two employees of a Government company were terminated under Rule 9(i) of the Central Inland Water Transport Corporation Ltd. (Service, Discipline and Appeal) Rules, 1979 which provided that the employment of permanent employees shall be subject to termination on three months notice or on payment of three months basic salary and dearness allowance in lieu of notice. They challenged the order by way of writ petition under Article 226 of the Constitution in the Calcutta High Court. The High Court struck down the said rule as being ultra vires Article 14 of the Constitution. The High Court further held that the Corporation was 'State' within the meaning of Article 12 of the Constitution and writ could be issued to it. The Supreme court upheld the judgment on appeal by the corporation. It was held that any rule which empowers a Government Corporation to terminate services of its employees by giving notice or pay in lieu of notice is opposed to public policy and violative of Article 14 as well as the Directive Principles contained in Articles 39(a) and 41 of the Constitution. The Supreme Court also held that the Central Inland Water Transport Corporation, a Government Company owned by the Central Government and two State Government is 'State' with in the meaning of Article 12 of the Constitution. Mr. Umesh Prasad Singh placed particular reliance on the observations contained in paragraphs 42 to 44 and 49 of the judgment. These observations, however, it would appear, were made in the context of discussion as to whether the Central Inland Water Transport Corporation is 'State' within the meaning of Article 12 of the Constitution or riot. The question whether the State is liable to pay the salary of the employees of a Government Corp oration/Company or to otherwise provide adequate fund to it so that the Company is able to conduct its affairs, was not at issue in mat case nor the same was gone into.

9. The Central Inland Water Transport Corporation is not the only case on the point, in fact, the judgment contains exhaustive references to several decisions of the Supreme Court on the point. In none of the cases, however, the Supreme Court has gone to the extent of holding that the State is responsible for the liability of a Government Company incorporated under the Companies Act. No decision of any High Court either taking that view was brought to our notice. On the other

hand, the decision in the case of Heavy Engineering Majdoor Union v. State of Bihar : (1969)IILLJ549SC , relied upon by the learned Advocate General, seems to support the contention made to the contrary, that Government Company incorporated under the Companies Act, as distinguished from Corporation or Company established by statute, stands on different footing. In that case certain disputed had arisen between the Management of the Heavy Engineering Corporation (HEC), a Government Company and its workmen which were referred to the Industrial Tribunal by the State Government. The Majdoor Union filed writ petition under Articles 226 and 227 of the Constitution disputing the validity of the reference, inter alia, on the ground that since the entire share capital of the company was contributed by the Central Government which had extensive powers of control and management over its functioning, the Company must be regarded as an industry carried on under the authority of the Central Government and, therefore, it was the Central Government which was the appropriate Government which could make the reference. The Supreme Court dealing with the said contention observed as follows:-

An incorporated company, as is well known, has a separate existence and the law recognises it as a juristic person separate and distinct from its members. This new personality emerges from the moment of its incorporation and from that date the person subscribing to its memorandum of association and Ors. joining it as members are regarded as a body incorporate or a corporation aggregate and the new person beings to function as an entity [Cr. Saloman v. Saloman and Company 1897 AC 22]. Its rights and obligations are different from those of its shareholders....The company so incorporated derives its powers and functions from and by virtue of its memorandum of association and its article of association. Therefore, the mere fact that the entire share capital of the respondent company was contributed by the Central Government and the fact that all its shares are held by the president and certain officers of the Central Government dose not make any difference. The company and the shareholders being, as aforesaid, distinct entities, the fact that the President of India and certain officers hold all its shares does not make the company an agent either of the President or the central Government...It is true that besides the Central Government having contributed the entire share capital, extensive powers are conferred on it. including the power

to give directions as to how the company should function, the power to appoint directors and even the power to determine the wages and salary payable by the company to its employees. But these powers are derived from the company's memorandum of association and the articles of association and not by reason of the company being the agent of the Central Government. The question whether a corporation is an agent of the State must depend on the facts of each case. Where statutes setting up a corporation so provide such a Corporation can easily be identified as the agent of the State as in Graham v. Public Works Commissioner 1901-2 K.B. 7881 where Phillimore, J., said that the Crown does in certain cases establish with the consent of Parliament certain officials or bodies who are to be treated as agents of the Crown even though they have the power of contracting as principals, in the absence of a statutory provision however a Commercial Corporation acting on its own behalf even though it is controlled wholly or partially by a Government department, will be ordinarily presumed not to be a servant or agent of the State. The fact that a minister appoints the members or directors of a Corporation and he is entitled to call for information to give directions, which are binding on the Directors and to supervise over the conduct of the business of the Corporation does not render the Corporation as an agent of the government.

10. Earlier in the case of Praga Tools Corporation v. C.V. Imanual : (1969)IILLJ479SC , the Supreme court noticed the difference between the company incorporated under the Companies Act and statutory company. A writ petition was filed under Article 226 of the Constitution challenging the agreement entered into between the Management and the Union in regard to retrenchment of certain workmen. A learned Single Judge of the Andhra Pradesh High court held that the Company being on registered under the Companies Act and not having any statutory duty and function to perform, a writ of mandamus or any other writ can not be issued to it. The Division Bench, on appeal, held that although the writ petition was not maintainable, the High Court could still grant a declaration in favour of the petitioner that the impugned amendment was illegal and void. The Supreme Court on appeal by the Company held that the Company being a non-statutory body and incorporated under the Companies Act, it was neither any statutory nor any public duty imposed on it by the State in respect of which enforcement could be sought by means of a mandamus. The Supreme Court

observed:-

In our view once the writ petition was held to be misconceived on the ground that it would not lie against the Company which was neither statutory company nor one having public duties or responsibilities imposed on it by statute, no relief by way of a declaration as to invalidity of the impugned agreement between it and the employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder.

11. In about the same period the Supreme Court in the case of Dr. S.L. Agrazval v. General Manager, Hindustan Steel Ltd. : (1970)IILLJ499SC had occasion to consider the question as to whether the employees of a Government Company such as Hindustan Steel Ltd. are entitled to the protection of Article 311 of the Constitution. The appellant concerned in that case had been removed from service which he challenged in the High Court by way of writ petition under Article 226 of the Constitution. While denying the protection of Article 311(2) of the Constitution the Supreme Court held that the Hindustan Steel Ltd. is a Corporation and not department of the Government. It has its independent existence and by law relating to Corporation it is distinct from its members.

12. The decisions of the Supreme Court in the cases of Praga Tool Corporation (supra), Heavy Engineering Majdoor Union (supra) or S.L. Agrawal (supra) have been noticed and explained by the Supreme Court in later decisions. Paragraphs 28 to 30 of the judgment in the well known case of Ramana Dayaram Shetty v. international Airport Authority of India : (1979)IILLJ217SC , contain a rather elaborate reference to the said three decisions. Their Lordships concluded that the aforesaid decisions do not lay down that Praga Tools Corporation or the Heavy Engineering Corporation or the Hindustan Steel Ltd. are not instrumentalities of the Government and, therefore, not 'authority' within the meaning of Article 12 of the Constitution. It was clarified that 'when we speak of a Corporation being an instrumentality or agency of Government, we do not mean to suggest that the Corporation should be an agent of the Government in the sense that whatever it does should be binding on the Government. It is not the relationship of the

Principal and agent which is relevant and material but whether the Corporation is an instrumentality of the Government in the sense that whatever it does should be binding on the Government. It is not the relationship of the Principal and agent which is relevant and material but whether the Corporation is an instrumentality of the Government in the sense that a part of the governing power of the State is located in the Corporation and though the Corporation is acting on its behalf and not on behalf of the Government, its action is really in the nature of State action'.

13. A decision rendered in the context of an Incorporated Company, Som Prakash Rekhi v. Union of India , although not cited at the Bar, may be noticed. That was case of an employee of the Burma-shell oil Storage Limited filing writ petition under Article 32 of the Constitution before the Supreme Court for pension. Burma Shell, for short, was statutorily taken over under Burma Shell (Acquisition of Undertakings in India) Act, 1976 and was vested in Bharat Petroleum under the Companies Act on 1st August, 1977. While considering the question as to whether Bharat Petroleum Corporation falls within the ambit of the 'State' under Article 12 of the Constitution the Supreme Court held that there was no distinction between the statutory Corporations and the Incorporated Companies for denying the claim of the employee against them. The Court noted that a Corporation or Company has legal existence of its own. the characteristics of a Corporation, the rights and liabilities, functional autonomy and juristic status, are jurisprudentially recongnised as a distinct entity even where such Corporations are State agencies or instrumentalities. However, having said so, the Court observed that the Government Company can not be equated with the State. On payee 218 of the judgment it was stated,

A Government Company has a distinct personality which cannot be confused with the State.

The claim of the writ petitioner was allowed in view of the provision of the Burma Shell (Acquisition of Undertakings in India ) Act, 1976 holding that although Bharat Petroleum Corporation has not been created by any statute, it is 'recognised by and clothed with rights and duties by the statute'. It should be kept in mind that this decision also is authority on the point that Bharat Petroleum Corporation is an

instrumentality of the State and writ can be issued to it.

14. It is not necessary to multiply decisions on the point as to whether Government Corporations/Companies incorporated under the Companies Act are 'State' with in the meaning of Article 12 of the Constitution and, therefore, amenable to writ jurisdiction of the High Court under Article 226. In view of the decision in Sukhdeo Singh v. Bhagat Ram Sardar Singh Raghubansh : (1975)ILLJ399SC . Rohtas Industries Ltd. v. Rohtas industries Staff Union and Ors. : (1976)ILLJ274SC . Raman Dayaram Shetty v. International A.I.R.port Authority of India Ltd. : (1979)IILLJ217SC . Som Prakash Rekhi v. Union of India A.I.R. 1979 Supreme court 212, Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly : (1986)IILLJ171SC , Anadi Mukta Sadguru Shri Muktaji Vandasji Swami Suvarna jayanti Mahotsav Smarak Trust v. V. R. Rudani and Ors. : (1989)IILLJ324SC , the previous decisions in the HEC case : (1969)IILLJ549SC ) or Praga Tools Corporation : (1969)IILLJ479SC or S.L. Agrawal's case : (1970)IILLJ499SC , to the extent of holding that writs can not lie against the Government companies incorporated under the Indian Companies Act, must be held to have been diluted. Reference in this connection may be made to a decision of a Division Bench of this Court consisting of two of us (CJ. and SJ. Mukhopadhaya, J.) in the case of The Indian Steel and Wire Products Limited v. The State of Bihar and Anr. C.W.J.C. No. 686 of 1996(R), disposed of on 27th February, 1997. There in while dealing with the preliminary objection as to the maintainability of writ petition against Tata Iron and Steel Company Limited, it was observed, after referring to several judgments of the Supreme Court.

Power under Article 226 is all pervasive and there does not appear to be any reason why that power should be confined only to issue directions, or orders or writs to 'the State' as denied in Article 12 and to put shackles on the power of the High Court to issue such directions, or orders or writs to any person or authority, including the Government which is conferred on it by express words of the Constitution. It is different thing that the High Court in its wisdom has put restraint on the use of this extraordinary power but that does not mean that it cannot exercise this power in a given situation. When a 'person' includes any company or association or body of individuals, whether incorporated or not, I do not

understand why in this clear definition of 'person' I should refer to Article 12 of the Constitution to exercise powers under Article 226.

15. The distinction between Government companies created by statute, called statutory Corporations and the Corporations/Companies incorporated under the statue such as Companies Act, however, should be kept in mind. Such distinction was pointed out in Praga Tools Corporation (supra) as well as in Heavy Engineering Majdoor Union (supra). By reason of the subsequent decisions the distinction, so far as the question of its legal character for the purpose of exercise of writ jurisdiction of the High Court is concerned, no longer stands. But for the purpose of determining the liability of the State in the matter of payment of salary etc. to the employees of such Corporations or Companies, the distinction remains as before. These cases in hand related to the incorporated Companies i.e. Companies created under the Companies Act by incorporation and, therefore, it is not at all necessary to make a detailed discussion regarding statutory Corporations or Companies. Suffice it to say that, so far as the question of liability of the State in the context of employees of statutory Corporations is concerned, it would depend on the provisions of the statute concerned.

16. Counsel for the petitioners, however, contended that incorporation of the two Corporations/companies in question under the companies Act by the State is a mere device to evade its liabilities which it would have otherwise to bear had it been carrying on the same activities through its departments. He, therefore, urged that the Court should lift the 'corporate veil' to find out the real personality of the companies. He in this connection made reference to various provisions of the Articles of Association. He also referred to different communications issued by the concerned Government Departments giving directions of sorts for close of the Tractor unit, purchase of pumping sets, appointment of employees and the like. He submitted that the Corporations are virtually the surrogate of the State Government. Therefore, no matter whether the Corporations are professedly conducting their business under the respective Articles of Association, it is really the Government which is controlling and managing their affairs and business.

17. In L.I.C. of India v. Escorts Limited : 1986(8)ECC189 , it was stated, 'while it is firmly established ever since Salomon v. Salomon and Company 1897 AC 22 was decided that a company is an independent legal personality distinct from the individuals who are its members, it has since been held that corporate veil may be lifted, the corporate personality may be ignored and the individual members recognised for who they are, in certain exceptional circumstances', the argument of the learned Advocate General in this regard, as noticed above, was that the corporate veil can be lifted only in the circumstances enumerated in Palmer's Company Law. It is not possible to accept the submission. Firstly, the circumstances enumerated by the learned author can not be treated as exhaustive, secondly, they do not take into account a situation where the control of the State Government is all-pervasive. Cases where the Corporation cannot take any decision whatsoever in matters relating to policy, finance, administration and so on without the approval of the State Government, may be another category of cases or circumstance where also the 'corporate veil' can be lifted. As a matter of fact, in the Escort's case (supra), their Lordships after referring to Pennington's Company Law, Palmer's Company Law and gower's Company Law, held:-

Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute it self contemplates lifting the veil, or fraud or improper conduct is intended to be prevented, or a taxing statute or a beneficent statute is sought to be evaded or where associate companies are inextricably connected as to be, in reality, part of one concern, . It is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since, that must necessarily depend on the relevant statutory or other provisions, the objects ought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect of the parties who may be affected etc.

18. The argument of the counsel for the petitioners, therefore, can not be summarily rejected. In the facts of the present case, I am rather inclined to agree with the counsel that it is really the State Government which has been carrying on the activities through these Corporations. The Corporations are like 'extension counters' of the Government Departments. Even so, in view of the decision in the HEC case and other cases mentioned above, I am unable to issue any direction to

the State Government to pay salary to their (Corporations') employees. In none of the subsequent cases so far, the Supreme Court has gone to the extent of holding that the State is responsible for the liability of the incorporated companies. The horizons of the administrative law and constitutional law are expanding. By virtue of the judgments of the Supreme Court the matters and objects which earlier lay beyond the scope of judicial review are now amenable to writ jurisdiction of the High Court and subject to judicial scrutiny. Perhaps, the days are not far off when the distinction between companies/Corporations and incorporated Government Companies may be done away with. Within the parameters of the law, as it stands, however, it is not possible for this Court to issue any direction to the State for payment of salary to the employees of these Corporations.

19. I am, therefore, of the opinion that the petitioners can not maintain their claim against State of Bihar. They are entitled to reliefs only against the respective Corporations, namely, Bihar Finished Leathers and the Bihar State Agro Industries Development Corporation. The Corporations have, however, come with a plea that they have no fund and resources from which salary can be paid to the employees. In such a situation, in my opinion, apart from issuing a direction to them to pay the salary to the employees, the proper direction to be issued would also be for the winding up of the Corporations. Section 433 of the Companies Act provides for the situation where a company may be wound up by the Court. A company may be wound up under Section 433, inter alia, where it is unable to pay its debt under Clause (e) or where the Court is of the opinion that it is just and equitable that the company should be wound up. In my opinion, the case comes under both the clauses. I would, .therefore, direct the State Government to file winding up petition in this Court if the two Corporations are not able to pay salary to their employees within a period of four months and revive themselves as viable enterprises, so that the assets of the companies may be sold and the salary etc. are paid to the employees, in accordance with the provisions of the Companies Act.

20. During hearing of the case counsel for the petitioner highlighted the fact that where almost all the Corporations are running in loss and many of them are closed, their limited resources/funds are being utilised for payment of allowances to their chairmen and the Directors. It was pointed out that in almost all the

Corporations the Chairmen are political appointees. Their appointment as Chairman confers upon them certain ministerial status which entitles them to certain benefits and advantages, which they get at the cost of the company. Learned Advocate General had hardly any answer to these submissions.

21. As regards office of Chairman, it may be stated that Section 175 of the Companies Act provided for election of a Chairman to preside over a particular meeting alone and for no other purpose. In the matter of management of the company he has no role, all the powers vest in the Board of Directors. Therefore, it is not understandable as to why the position of Chairman of such Corporations should be allowed to exist at all. In terms of Section 175 of the Companies Act the members personally present at meeting are supposed to elect one of themselves to be the Chairman of the meeting on show of hands unless the Articles of Association otherwise provide. Therefore, I am satisfied that creation of the office of the Chairman and its continuance is wholly unwarranted. Having regard to the financial plight of the company concerned, there can hardly be any justification for them to continue in their office. I would, accordingly, in facts and circumstances of the case, direct that the Chairmen of all Incorporated Companies and Corporations including those of the Bihar Finished Leathers Limited and the Bihar State Agro industries Development Corporation Ltd. shall cease to function forthwith.

22. These two writ petitions are, for the reasons stated above, dismissed, but with the above noted directions. I would make no order as to costs.

**SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com**