

**‘GOVERNMENT COMPANY’ – IS IT ‘STATE’ FOR THE PURPOSE
OF CONSTITUTIONAL LAW**

by

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ABSTRACT

The Companies Act, 2013 is a milestone legislation framework with far-reaching effects on all the companies registered or working in India. The major focus of this research paper is to analyse whether the Government Company can be regarded as a ‘State’ under the ambit of Article 12 of the Constitution of India? In this research paper, the researcher attempts to explain the meaning of a company and what is meant by a Government Company. An attempt is also made to clarify the definition of State provided under Article 12 of the Constitution of India. Definitions and other information are taken from the authorised sources. The paper attempts to bring light on various aspects and provisions related to the Government Company. The researcher has particularly discussed the provisions applicable on the Government Company. The paper also focuses on the efforts made by the Hon’ble Supreme Court and various High Courts in clarifying that what all companies can come under the ambit of ‘State’ under Article 12 of the Constitution. The consequences of including a Government Company under the definition of ‘state’ provided under Article 12 of the Constitution of India have also been examined by the researcher. There is also a brief portion on the privileges provided under Article 311 of the Constitution of India to the person employed by the Government of India or State in civil capacities. This is included to elucidate that the Government Company is a separate entity from the Government. Such of the points are discussed in sufficient detail. Before going on these issues, the researcher has tried to explain the meaning of ‘company’.

INTRODUCTION

Company means voluntary association of persons coming together for a common purpose of carrying on a business and sharing of profits among them. The word ‘company’ is derived from the latin word ‘Com’ meaning ‘together’ and ‘panis’ meaning ‘bread’. It meant an association of persons taking their meals together in earlier days. Now, it means a corporate body having distinct status from its members, common seal and perpetual succession. Section 3 (1) (i) of the Companies Act, 1956 defines a company as “a company formed and registered under this Act or an existing company”.

The major characteristics of a company are-

1. A company is recognised as a separated legal entity distinct from its members. A company exists independently and separately from all its directors or shareholders. This is called as the veil of incorporation. Because of the separate legal entity of a company, a company is not affected by any change such as death or retirement or resignation of its director or transfer of its shares and the Company continues to exist and carry on its business until it is wound up.
2. The company has a limited liability because the liability of its members is limited to the value of shares contributed by them.
3. Another characteristic of a public limited company is that the shares are freely transferable from one person to another without any restriction imposed by the company.
4. A company has a Board of Directors with a delegated management.

Generally, there are two types of companies under the Companies Act, 1956-

1. Public Company
2. Private Company

These companies can be incorporated as Limited Liability Company and unlimited liability company. Limited Liability Company may be-

1. Company limited by shares
2. Company limited by guarantee
3. Company limited by both shares and guarantee

GOVERNMENT COMPANY

The Government Company means a company registered under the Indian Companies Act, 1956. The account books of these companies are reviewed by the Parliament or the State Legislation.

A Government Company is defined in Section 617 as “any company in which not less than 51 per cent of paid-up share capital is held by the Central Government or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Governments Company as thus defined.” The name of Government Company shall have the word ‘limited’ in its name.

Some of its distinctive features are-

- Transfers of shares in respect of the securities held by the Government are not applicable to the Government Company. (Section 56)
- An Annual general meeting shall be held at the registered office of the company or any place as the Central Government may approve in business hours at any day other than the national holiday.
- According to Section 149(1), the Government Company can have more than 15 directors.
- Board of Directors are vested with the management of the Government Company. Government or the Shareholders can appoint the board of directors.
- Government Company is a separate legal entity distinct from its members having perpetual succession and common seal.
- Where the Companies Act provides that the consent of the court is to be obtained, the Government Company can approach the Central Government for such consent or approval.

SPECIAL PROVISIONS REGARDING GOVERNMENT COMPANIES

1. Audit related provision-

The Comptroller and auditor general of India appoint the Auditor of the Government Company. The Comptroller and auditor general of India is empowered to give instructions regarding the manner in which the company’s accounts are to be audited by the auditor and any matter regarding the performance of his functions as such.

The Auditor is required to submit the report formed by him to the Comptroller and Auditor General and then such report shall be placed before the Annual general meeting of the Company.

2. As regards Annual Reports-

An annual report on the working and affairs of the company within three months of the annual general meeting shall be prepared if Central Government is a member of a Government Company. And it shall be placed with the audit report before both the Houses of Parliament.

Annual report with the audit report shall be placed before the Houses of the State Legislature where the State Government is the member of the Government Company.

3. As regards the Application of the Companies Act-

The Government Company is to be registered under the Companies Act. The official gazette of the Central Government may by notification direct that the provisions of the Act-

- a. Shall not apply to the Government Company
- b. Shall apply to the Government Company, only with exceptions, modifications and adaptations, as may be specified in the notification.

4. As regards the provisions of the Companies Act-

The following provisions of the Companies Act are not applicable to the Government Company-

- a. In case of company wholly owned by the Government, the provision regarding the appointment and retirement of the directors of the Company.
- b. The provisions relating to appointment of managing/whole-time directors and remuneration of managing director/whole-time director and manager of a company

MEANING OF WORD 'STATE'

The definition of the word 'state' is provided under Article 12 of Part III of the Constitution of India. It defines that 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.”¹

Thus, the expression ‘state’ shall include the following in its preview-

- (i) The Government of India;
- (ii) The Parliament of India;
- (iii) The Government of each of the States which constitute the Union of India;
- (iv) The Legislature of each of the States which constitute the Union of India;
- (v) All local authorities within the territory of India;
- (vi) All local authorities under the control of the Government of India;
- (vii) All other authorities within the territory of India; and
- (viii) All other authorities under the control of the Government of India.²

The word ‘state’ under Article 12 of the Constitution of India includes all local and other authorities within the territory of India or under the control of the Government of India.

In the case of *Ujjain Bai v. State of U.P.*³, the Supreme Court observed that the word ‘state’ under Article 12 of the Constitution has a wide scope and thus it cannot be taken *as ejusdem generis* with the Government of India or any State or the Legislature or the Local authorities. Every authority whether created by statute or functioning in India can be included within the definition of ‘State’.

Thus, the definition of the word ‘state’ keeps on expanding with time by courts. Courts have held that the definition provided under Article 12 of the word ‘state’ is not exhaustive.

IS GOVERNMENT COMPANY A STATE?

The Supreme Court of India has held in a number of cases that public undertakings and Government Company are included in the definition of ‘state’ under Article 12 of the Constitution of India. Therefore, these undertakings and corporations are subject to Judicial

¹ Article 12, The Constitution of India, 1950

² Abhinove Mishra “Meaning of State as per Constitution Of India-Article 12”

³ AIR 1962 SC 1621

Review by the Supreme Court and High Court under Article 32 and 226 of the Constitution. Exercising the power the Supreme Court and High Court have interfered with the decisions of these undertakings and corporations with regard to service matters and commercial transactions. This has created hurdles in the functioning of the Public Sector Undertaking.

This expanded interpretation of Article 12 has started with the decision of the Supreme Court in the case *Rajasthan State Electricity Board, Jaipur v. Mohan Lal*⁴. In this case it was held that the Rajasthan State Electricity board falls within the definition of 'state' because such authorities are constitutionally or statutory authorities and that they exercise power conferred by law. This judgement was reiterated in the case of *Sukhdev Singh v. Bhagat Ram*⁵ by the Supreme Court.

The Hon'ble Supreme Court in the case of *Ajay Hasia v. Khalid Mujib*⁶ dealt with the question that whether the Government Company is the body or instrumentality of the State or not? The court in this case laid down the test for determining the answer-

1. Whether the entire share capital is held by the government or not?
2. Whether the corporation enjoys monopoly status conferred by the state?
3. Whether the functions of the corporations are Governmental functions or the functions of a welfare state?
4. Whether a department of the government has been transferred to the corporation?
5. The extent of financial assistance given by the state?
6. The measure of state control?
7. Whether any statutory duties are imposed on the corporation or not?

In the primitive societies, the functions of the state were limited to the maintenance of the society. It could effectively perform its functions through natural persons constituting its civil services. But in the modern society which is a welfare society, the state has to perform many functions which are important for the welfare of the society. In such situation the civil servants cannot successfully handle the task of the government. Thus, the government acts through the corporation or company for the convenient management and administration of its functions.

⁴AIR 1967 SC 1857

⁵AIR 1975 SC 1331

⁶1981 AIR 487

Thus, a company is an ‘authority’ within the meaning of Article 12 of the Constitution where the company is an agency or instrumentality of the state.

The question that whether Bharat Petroleum Corporation, being a Government Company registered under the Indian Companies Act, is a State under Article 12 of the Indian Constitution was dealt under the case of *Som Prakash v. Union of India*⁷. The court held that the Company Bharat Petroleum Case would be a state under Article 12 of the Constitution of India.

Same question that whether a Government Company defined under Section 617 of the Companies Act is a ‘state’ within the meaning of Article 12 of the Constitution of India came before the Hon’ble Supreme Court in the case of *Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers’ Association*⁸. The court held that because the state government had exclusive control over the functions of the company therefore the company was held to be an agency or instrumentality of the state. Thus, Government Company was held to be a state under Article 12 of the Constitution of India.

The Supreme Court while dealing with the question whether a Government Company is a State or not under Article 12 of the Constitution of India in the case of *R.V. Dnyansagar v. Maharashtra Industrial and Technical Consultancy Organisation Ltd.*⁹ stated that one should look into the fact that whether the company is financially or functionally under the government. Thus, the court held that the company was not a state under Article 12 of the Constitution.

In the case of *P.B. Ghayalod v. M/S. Maruti Udyog Ltd*¹⁰, it was held by the Supreme Court that where there is a substantial foreign holding in a Government Company and the decision taken by the company requires the approval of the foreign partner, the company cannot be taken as an agency or instrumentality of the state because the Indian Government can never have full functionally or financial control over the company.

A strict formula was necessary in order to certain the link between the undertaking and the ‘state’ or to answer the question that whether an undertaking was ‘state’ or not? This was fundamentally dealt with in the case of *R.D. Shetty v. International Airport Authority of India*¹¹.

⁷ 1981 AIR 212

⁸(2002) 2 SCC 167

⁹[2003] 46 SCL 153

¹⁰P.B. Ghayalod v. M/S. Maruti Udyog Ltd. And Others AIR 1992 Delhi 145

¹¹AIR 1979 SC 1626

The Supreme Court held that a corporation established or incorporated by or under any statute or law are an agencies or instrumentality of the state, if they satisfy certain guidelines which are-

- The source of the Share Capital
- The extent of state control over the corporations.
- Whether the corporation has a monopoly status or not.
- Whether the functions of the corporate entity are of public importance and closely related to governmental functions.
- Whether, what belonged to government department formerly was transferred to the corporations.

The Supreme Court stated that the list is not exhaustive because of the growing functions of the Government, growing complexities of the management and the administration of the corporations. And making an exhaustive list in all cases provide an unfailing answer to the question that whether an government undertaking is a 'state' under Article 12 of the Constitution or not? The courts to arrive at an answer would have to consider the cumulative effect of these factors and the fact and circumstances of each case. The court further clarified that the corporation which are considered as 'state' or the instrumentality or agency of the Government would be subject to same constitutional or public law limitations as the Government. The court while referring to the principle of equality before law under Article 14 of the Constitution of India, declared that such corporations should equally deal with the public without any arbitrary actions, whether in the matter of giving jobs or entering into contracts or otherwise. Such corporations cannot enter into any contract with any person it likes at its own sweet will. The actions must be in conformity with some principle which meets the test of reason and relevance.

In determining whether an undertaking is a state or not under Article 12 of the Constitution the most essential ingredient emphasised by the Courts is the public character of the undertaking. The public character of the functions of the corporations has also been emphasised by Mr. Justice Mathew in the case of *Sukhdev Singh v. Bhagat Ram*¹². As a result, Government Companies as defined in Section 619 of the Companies Act, 1956 came to be included within the term 'state' as defined under Article 12 of the Constitution of India.

¹²AIR 1975 SC 1331.

In the case of *Son Prakash Rekhi v. Union of India*¹³, Bharat Petroleum Corporation was held to be within the ambit of 'state' under Article 12 of the Constitution. Similarly, in the case of *Mahabir Auto Stores v. Indian Oil Corporation*¹⁴, Indian Oil Corporation was also held to be within the ambit of 'state' under Article 12 of the Constitution. Thus, the sudden stoppage of supply of lubricants to the petitioner by the respondents was held to be violative of Article 14 of the Constitution and arbitrary and against the principle of Natural justice and fair play and unreasonable.

Registered societies which are under the control of the Government were also held to be within the ambit of 'state' by several decisions of the court. Some of the societies include Indian Statistical Institute,¹⁵ Indian Council of Agricultural Research,¹⁶ Buddhist School¹⁷ and Children's Aid Society¹⁸. On the contrary, where the court felt that the society was not under the control of the Government or was not related to the Government functions, the Society would not fall within the ambit of 'state'. This was held in the case of *Tek Raj Vasandi v. UOI*.¹⁹

Nationalised Banks which were under the control of the Government were also held to be within the ambit of 'state'.²⁰ Contrary the banks which are not under Government Control were held not to be within the ambit of 'state'.²¹ A non-statutory body would not be deemed to be within the ambit of 'state' if it does not perform any statutory or public duty.²²

Legal Position

The Supreme Court of India has clearly established that a Corporation, a Government Company or any other instrumentality of the State or agency constituted under the Statutory provision or under the Companies Act would fall within the definition of 'state' under Article 12 of Part III of the Constitution of India provided such undertaking fulfil the requirements discussed. The principle laid down by the Hon'ble Supreme Court in the case of *R.D. Shetty v. International*

¹³AIR 1981 SC 212

¹⁴(1990) 3 SCC 752

¹⁵B.S. Minhas v. Indian Statistical Institute, (1983) 4 SCC 582

¹⁶P.K. Ramchandra Iyer v. UOI, (1984) 2 SCC 141

¹⁷Chairman, School of Buddhist Philosophy v. Makhanlal Mattoo, (1990) 4 SCC 6.

¹⁸Sheela Barse v. Secretary, Children's Aid Society, (1987) 3 SCC 50.

¹⁹(1988) 1 SCC 236

²⁰Hyderabad Commercials v. Indian Bank, (1991) 2 SCALE 825.

²¹Chakradhar v. Sama Singha Service Co-operative Society, AIR 1982 Orissa 38; Pritam Singh v. State of Punjab, AIR 1982 P&H 228; Satish Kumar v. Punjab State Co-operative Bank, AIR 1981 P&H 382; Sri Konaseema Co-operative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171.

²²Praga Tools Corporation v. CA Imanual, (1969) 1 SCC 585.

*Airport Authority of India*²³ is the law of the land. Any contrary view taken by any of the High Courts would be deemed as incorrect.

CONSEQUENCES OF INCLUDING GOVERNMENT COMPANY WITHIN THE DEFINITION OF 'STATE' UNDER ARTICLE 12 OF THE CONSTITUTION

As a consequence of the expanded view of Article 12 of the Constitution of India taken by the Supreme Court of India it was alleged that it has resulted in the wide scope of Judicial Review which has caused hurdles in the functioning of the Government Companies or Public Sector enterprises in matters related to contracts, service conditions and other matters. And thus, this has affected the efficiency of these undertakings in carrying on the business activities in business-like manner.

But, as a matter of fact, the Supreme Court or High Court under Article 32 or 226 does not affect the efficiency of Public Sector Undertaking. The efficiency depends upon the managers, workers, and officer of the Public Sector Undertaking. It is based on the management, planning, handwork, integrity, honesty of those who are working in the undertaking. Court's interference is sought when there is violation of law or any constitutional provisions. Only when there is a violation of fundamental rights provided under Article III of the Constitution of India, the Supreme Court would interfere with the functions or working of the Public sector Undertaking. Such interference cannot be said to affect the efficiency of the business. Every authority in the world is bound to act in accordance with the Constitutional provisions and the fundamental rights provided under Part III of the Constitution.

Thus, the judicial interference in the case of the violation of fundamental rights cannot lead to inefficiency in the working of the Public Sector Undertaking. A government company or public sector undertaking like any other undertaking or company or authority has to respect the law of the land and the supreme law of the land i.e. the Constitution of India.

PRIVILEGES UNDER ARTICLE 311

Employees of public sector undertaking or government companies do not enjoy the benefits provided under Article 311 of the Constitution. Article 311 provides certain safeguards to with respect to Dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State. The major safeguards provided are as under-

²³AIR 1979 SC 1626

1. No person who is a member of a civil service of the Union or an all India service or a civil service of a State or holds a civil post under the Union or a State shall be dismissed or removed by an authority subordinate to that by which he was appointed.

2. No such person as aforesaid shall be dismissed or removed or reduced in rank except after an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges.

The benefit of this Article is not conferred on the person who is not a civil servant or who does not hold a civil post under the Union or the State. Since Public Sector Undertaking are separate from the Government and the employees of the Public Sector Undertaking are not paid out of consolidated fund of Government, the post do not constitute a civil post. Thus, the benefits of Article 311 do not apply to them.²⁴ Since the undertakings are legal entities separate from the Government, their employees do not enjoy the protection granted under Article 311 of the Constitution of India.

CONCLUSION

A public company registered under the Companies Act, 1956 is called the Government Company. In these companies, Centre or State Government is the major shareholder.

A separate litigation policy and strategy should be developed by the Government and Public Sector undertaking to encourage avoidance of litigation and settlement of dispute by alternative method. It should conserve their resources of time and money and decide priorities so that unproductive litigation should not be given attention and expenditure on them can be saved.

To conclude with, Government companies, owned and controlled by the Government are instrumentalities and agencies of the Government thus, they are included within the ambit of 'state' under Article 12 of the Constitution of India. They are also prevented from exercising arbitrary powers and encroaching upon the basic fundamental rights of their employees. The powers of such enterprises are controlled and regulated by the statute which created the enterprises and the law of the land. Private individuals can approach the court to enforce the rights against these enterprises or companies.

²⁴Sukhdev Singh v. Bhagat Ram, AIR 1975 SC 1331; Som Prakash Rekhi v. UOI, (1981) 1 SCC 449; Ajay Hasia v. Khalid Mujib, (1981) 1 SCC 722; AR Kalra v. P&E Corporation of India, AIR 1984 SC 1361.

The Supreme Court or the High Court under their power of judicial review provided under Article 32 and 226 respectively do not affect the efficiency or create hurdles in the working of these corporations. It is only on the violation of the fundamental rights provided under Part III of the Constitution of India or the provisions of any other law of the land that the courts are given power to regulate the working of these enterprises.

