

rendered in one of them may, therefore, be allowed to count towards increment in the other."

Therefore, if two posts in different departments carry the same pay scale, their duties and responsibilities have to be treated at par and equal for all intents and purposes.

(10) Consequently, I allow this petition and by issuing a writ of *mandamus*, direct the respondents to release to the petitioner the revised pay scale of Rs. 7,300—7,600 with effect from 5th December, 1986, and to pay to him the arrears of salary and other allowances, on the basis thereof. The result of pay-fixation shall also be reflected in the increase in pension, gratuity and other retirement benefits to which the petitioner would have been entitled, had his pay scale been revised to Rs. 7,300—7,600 with effect from 5th December, 1986, before the date of his superannuation, that is, 31st December, 1987. Since the petitioner has already retired from service, the arrears of the aforesaid dues shall be paid to him with interest at the rate of twelve per cent per annum from the date of accrual till the date of actual payment. The petitioner shall also be entitled to the costs of this writ petition, which are quantified as Rs. 1,000.

R.N.R.

Before M. R. Agnihotri & N. K. Sodhi. JJ.

A. P. SUTHAR,—Petitioner.

*versus*

THE ASSOCIATED CEMENT COMPANIES LTD., BOMBAY AND ANOTHER.—Respondents.

Civil Writ Petition No. 4845 of 1989.

20th March, 1991.

Constitution of India, 1950—Art. 12—Companies Act, 1956—Expression 'other authorities'—Ambit of—Company registered under the Companies Act—Central & State Government holding small percentage of its shares—Board of Directors of Company mainly private individuals—Company carrying on industry mentioned in Schedule—Such Company—Whether per se an instrumentality or agency of the State.

A. P. Suthar v. The Associated Cement Companies Ltd. Bombay  
and another (N. K. Sodhi, J.)

*Held*, that the holding of an insignificant percentage of shares can not possibly give even a semblance of any control much less effective control over the affairs of the company. The company is governed by a Board of Directors who are mainly private individuals and have nothing to do with either the Central or State Government or with financial institutions. Thus, it is evident that apart from the share holding by the Government which, as it is, gives no control to it, the constitution of the Board of Directors is also such that the Government cannot exercise any control through it. The company is in the private sector and its shares are quoted in different stock exchanges in the country and cannot, therefore, be considered an instrumentality or agency of the State.

(Para 7)

*Industries (Development & Regulation) Act, 1951—Constitution of India, 1950—Art. 12—Scope of—Limited—Test of 'deep and pervasive State control'—Company being a scheduled industrial undertaking manufacturing cement and its allied products—Matters regarding its registration, obtaining of licence and setting up of Advisory & Development Councils by the Central Government under the 1951 Act—Regulatory in nature and do not give deep and pervasive State control over the Company.*

*Held*, that any undertaking carrying on industries mentioned in the schedule to the Industries (Development & Regulation) Act, 1951 can not *per se* be deemed to be a State within the ambit of Article 12 because of the types of control exercisable by the Central Government under the Act. It is the totality of the control over the affairs of an undertaking in the matter of its management, policy making, day to day working and the like that has to be seen in order to determine whether the test of 'deep and pervasive State control' is satisfied. It is true that the undertaking has got to be registered, a licence obtained by it and the Central Government has set up Advisory and Development Councils to advise it on all matters concerning the development and regulation of scheduled industries like the present one in order to get expert advice to ensure the efficiency and productivity of a scheduled industry and a Development Council has even to submit reports, but these are all matters of regulatory nature and not that the control becomes deep and pervasive as to satisfy this test. It is not the regulatory type of control that the State has under the Act over a scheduled industry. Widening of the scope of Article 12 to such an extent will not only be unwise but unjustified also.

(Para 8)

*Writ petition under Articles 226/227 of the Constitution of India praying that:—*

- (i) *the writ petition be allowed and a suitable writ, order or direction be issued quashing the impugned termination order Annexure P-4;*

- (ii) *a suitable writ, order or direction be issued declaring Rule 12.3 (b) to be illegal, unconstitutional and against the public policy and violative of Articles 14 and Directive Principles contained in Articles 39 (a) and 41 of the Constitution of India and on the same reasoning, the sub-clause 3 of the appointment letter Annexure P-1 be also declared of no consequence so far as the right of the petitioner to continue in service is concerned.*
- (iii) *filing of certified copies of Annexures P-1 to P-5 be dispensed with;*
- (iv) *issuance of advance notices to the Respondents be dispensed with;*

*It is further prayed that during the pendency of the writ petition, operation of impugned order Annexure P-4 be stayed. In this connection, it is submitted that recently this Hon'ble Court has been staying the termination of Daily Wagers even and has stayed such termination in Civil Writ Petition No. 1616 of 1989. The petitioner's case is very genuine and strong in as much as when compared to the Daily Wagers, the petitioner is a confirmed hand and has put in 24 years continuous meritorious services with Respondents and thus the termination order Annexure P-4 deserves to be stayed during the pendency of the writ petition.*

S. K. Aggarwal, Advocate, with Amar Vivek Advocate, for the Petitioner.

H. L. Sibal, Sr. Advocate, with R. K. Handa, Advocate, A. C. Jain, Advocate, J. K. Sibal, Advocate, for the Respondents.

#### JUDGMENT

N. K. Sodhi, J.

(1) This set of two writ petitions raises a common question of law namely, whether the Associated Cement Companies Ltd. respondent, a company registered under the Companies Act 1956, is in essence an instrumentality or agency of the State and consequently amenable to the writ jurisdiction of this Court.

(2) The petitioner in Civil Writ Petition No. 4845 of 1989 is a qualified Civil Engineer and was employed by the Associated Cement Companies Ltd. Bombay (referred to hereinafter as "the Company") as Assistant Civil Engineer in the year 1965. According to the terms and conditions of his employment as contained in the

8

A. P. Suthar v. The Associated Cement Companies Ltd. Bombay  
and another (N. K. Sodhi, J.)

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letter of appointment, the petitioner was to remain on probation for a period of one year and was to be confirmed thereafter subject to his ability, work and suitability being found satisfactory. Clause 3 of the appointment letter provides that after confirmation the services of the petitioner could be terminated by either side by giving one month's notice or one month's pay in lieu thereof. His services have now been terminated in terms of clause 3 of the letter of appointment on paying him one month's salary in lieu of notice after he had put in more than 23 years of service. It is this order which is being challenged before us.

(3) A preliminary objection has been taken on behalf of the respondents that the employer-company which is incorporated under the Companies Act, 1956 as a public limited company is not a 'State' within the meaning of Article 12 of the Constitution of India and being in the private sector is neither controlled nor owned by any State Government or Central Government and, therefore, not subject to the writ jurisdiction of this Court. The petitioner has not made any relevant averments in regard to this aspect of the case in the writ petition though in support of its maintainability it has been pleaded in the replication that the company is an instrumentality of the State. It has been stated by the petitioner that Union of India on the basis of various provisions of the Industries (Development and Regulation) Act, 1951 (hereinafter called "the Act") has active control over the company. The Company, according to the petitioner, is a scheduled industry under the provisions of the Act and all important industries including cement industry, its activities, production and distribution affect the country as a whole and the Central Government is, therefore, to control and regulate production, distribution and the price of cement. A reference has been made to various provisions of the Act which according to the petitioner give enough control to the Government of India over the respondent-company so as to bring it within the ambit of Article 12 of the Constitution. It is further submitted that the Central Government is often issuing press notes rationalizing the pricing and distribution of cement products and exercising control over the cement industry by the issuance of control orders. Reliance is also placed by the counsel on the alleged role played by the Cement Industry in making suggestions to the Central Government for making favourable provisions in the budget for this industry. Mention has also been

made of the so called control by the Central Government through the Cement Controller of India and of the Government holding shares in the company and even having its officers as Directors of the Company. On these broad averments, the petitioner wants us to hold that the company is an instrumentality and rather an agency of the State and thus satisfies most of the tests laid down by the Apex Court for the determination of such an issue.

(4) The respondents have controverted the stand of the writ petitioners and their case is that the company was established in the year 1936 and is engaged *inter alia* in the manufacture and sale of cement and allied products. It is stated to be one of the leading cement manufacturers in the private sector in India having cement manufacturing units in several States in the country including the one at Surajpur in the State of Haryana. The shares of this company are stated to be popular with the investing public and are available through different stock exchanges. The majority of shares of the company are held by private persons and those held by the Central Government are significantly much less. The corporate share holders, in fact are private companies which are owned and controlled by the private sector. It is not disputed that on 31st March, 1990, 55,95,504 shares of Rs. 100 each had been issued by the company and the share-holding pattern was as under :—

1. Shares owned by individuals.	26,45,619
2. Shares owned by corporate share-holders	6,93,383
3. Shares held by Central Government (3 shares) and certain State Governments (43, 202 shares) and Government Companies (13 shares)	43,218
4. 20,93,093 equity shares were also held by financial institutions and General Insurance Companies.	

(5) There are said to be 18 Directors of the Company out of whom 14 are claimed to have nothing to do with the financial institutions, the State Governments or the Central Government suggesting thereby that the management of the Company is controlled by a Board of Directors, majority of whom are private individuals and it is only 3 of the Directors described as Special Directors who are representatives of State Governments which have granted mining

A. P. Suthar v. The Associated Cement Companies Ltd. Bombay  
and another (N. K. Sodhi, J.)

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leases to the Company and the remaining fourth Director represents the financial institutions which have advanced loans to the Company. This break-up of the Board of Directors has not been challenged by the petitioner. The further plea of the company is that by no stretch it can be deemed to be a Government Company.

(6) Having noticed the various contentions advanced on behalf of both the parties, it is necessary to refer to the tests laid down by the Supreme Court to determine whether the company in the present case can be said to an instrumentality or agency of the Government so as to answer the description of 'other authorities' and thus, a "State" within the meaning of Article 12 of the Constitution of India. The whole matter has since to be scrutinised in the light of the tests as enunciated in the basic judgment reported as *Ajay Hasia v. Khalid Mujib* (1), it becomes imperative that these be stated hereunder *in extenso* for facility of reference :—

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

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(1) A.I.R. 1981 S.C. 487.

- (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."

Before the tests are applied, it is to be remembered that, as observed by their Lordships of the Supreme Court, these tests are not conclusive or clinching but they are merely indicative indicia and have to be used with care and caution. Whatever be the necessity of giving a,—*vide* meaning to the expression 'other authorities' it has to be borne in mind that the expression is not stretched so much as to bring within its ambit every autonomous body which has some sort of a nexus with the Government. There has to be, indeed, a practical approach to the matter so as to the possibility of a very enlarged interpretation is restrained by proper limitation. It may again be pointed out, as observed by their Lordships in another judgment *Som Parkash Rekhi v. Union of India* (2), that it is the cumulative effect of all the tests that has to be assessed nor, as observed in *Tek Raj v. Union of India* (3), that it is not necessary that all the tests should be satisfied to arrive at the conclusion either for or against holding an institution to be 'State'. It can happen in a particular case that some of the features are so bold and prominent that the second view may not be possible while there can be other cases as well where the matter would be on the border line. There are a number of other cases both of the Supreme Court and High Courts, but a reference to most of them is not necessary as it would be only a re-statement of the tests and each case will depend on its own facts which have to be deeply scrutinised.

(7) Now coming to the case in hand, we may examine the prominent features of the company in the light of the aforesaid tests. It is not in dispute that out of the entire share capital of the company the Central and some State Governments hold only 43,218 shares out of a total of 55,95,504 as issued by the Company. The holding of such an insignificant percentage of shares cannot possibly give even a semblance of any control much less effective control over the affairs of the company. The company is governed by a Board of Directors having 18 members out of whom 14 are private individuals having

(2) A.I.R. 1981 S.C. 212.

(3) A.I.R. 1988 S.C. 469.

A. P. Suthar v. The Associated Cement Companies Ltd. Bombay  
and another (N. K. Sodhi, J.)

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nothing to do with either the Central or State Government or with financial institutions. As regards the remaining four Directors, one of them is a nominee of a financial institution that has advanced loans to the Company and he is, therefore, to watch and protect the interest of the institution which he represents. He is not to control the policies of the company. The other three Directors designated as Special Directors are nominees of the State Governments from whom or their predecessors in interest the company had taken mining leases and their nomination on the Board is in terms of the mining covenants. It is, thus, evident that apart from the share holding by the Government which, as it is, gives no control to it, the constitution of the Board of Directors is also such that the Government cannot exercise any control through it. The company is in the private sector and its shares are quoted in different stock exchanges in the country and cannot, therefore, be considered an instrumentality or agency of the State.

(8) It has been strenuously argued on behalf of the writ petitioners that cement industry has been classified amongst those over which the Government is in national interest exercising functional control in the matter of planning, promoting and development of such industries. The contention is that even if the undertaking is a company, the participation of the Central Government in its development and distribution of its products, price control and several other matters is such that company should be deemed to be an authority within the ambit of Article 12. The learned counsel has relied upon the provisions of Industries (Development and Regulation) Act, 1951 (referred to in short as "the Act") to support the contention that the provisions of the Act when minutely scrutinised will go to show that the Central Government is exercising deep pervasive control over the company. It is urged that the company which is manufacturing cement and its allied products is a scheduled industrial undertaking over which the Central Government is exercising deep and pervasive control through the provisions of the Act. We have been taken through the several provisions of the Act to show as to how Central Government continues to control the undertaking from its very inception. It is true that the undertaking has got to be registered, a licence obtained by it and the Central Government has set up Advisory and Development Councils to advise it on all matters concerning the development and regulation of scheduled industries



like the present one in order to get expert advice in order to ensure the efficiency and productivity of a scheduled industry and a Development Council has even to submit reports, but these are all matters of regulatory nature and not that the control becomes deep and pervasive as to satisfy the fourth test as laid down by the Supreme Court and quoted above. No doubt, the Government has the power to completely take over the management of the company in public interest in a certain situation but this power cannot possibly imply that a private enterprise till it is actually taken over has become an instrumentality or agency of the State. The existence of a power and the exercise thereof are two distinct matters and merely because the Central Government can exercise the power of taking over an undertaking will not convert the undertaking into a Government one. In a developing Welfare State as ours, it becomes imperative for the State to participate, interfere and exercise some control in several activities of business, trade and the like in order to regulate the same, but it does not follow therefore that every private enterprise carrying on such trade or business becomes an instrumentality of the State. We find ourselves unable to accept the broad and sweeping contention of the learned counsel for the writ petitioners that any undertaking carrying on industries mentioned in the schedule to the Act must *per se* be deemed to be a State within the ambit of Article 12 because of the types of control exercisable by the Central Government under the Act. It is the totality of the control over the affairs of an undertaking in the matter of its management, policy making, day to day working and the like that has to be seen in order to determine whether the fourth test of 'deep and pervasive State control' is satisfied. It is not the regulatory type of control that the State has under the Act over a scheduled industry which is contemplated by their Lordships in laying down the fourth test. If merely because a company incorporated under the Companies Act is running a business in any of the industries appearing in the first schedule of the Act and that for carrying on its business it has obtained loans from financial institutions for which each such institution has placed a Director on the Board of Directors, an inference that it is an instrumentality or agency of the Government has to be drawn, then in that case every limited company carrying on any business mentioned in the schedule with bank loans, will have to be described an instrumentality or agency of the State. Widening of the scope of Article 12 to such an extent will not only be unwise but unjustified also.

Sumer Chand v. The Haryana Khadi and Village Industries Board,  
Panchkula, District Ambala and another (G. R. Majithia, J.)

(9) The learned counsel for the petitioner has not relied upon any of the other tests in support of his contention that the company should be held to be an authority having the status of a State within the meaning of Article 12 of the Constitution.

(10) In the result, the preliminary objection prevails and we hold that the company is not an instrumentality or agency of the State and no writ can, therefore, be issued against it. In this view of the matter, it is not necessary to adjudicate on the merits of these writ petitions. The writ petitions are consequently dismissed with no orders as to costs.

(11) Before parting, it may be mentioned that the petitioners who are residing in company premises, apprehending their immediate eviction have undertaken to vacate the same within three months from today and the company is, thus, directed not to evict them till then.

S.C.K.

*Before G. R. Majithia, J.*

SUMER CHAND,—*Petitioner.*

*versus*

THE HARYANA KHADI AND VILLAGE INDUSTRIES BOARD,  
PANCHKULA, DISTRICT AMBALA & ANOTHER.—*Respondents.*

*Civil Writ Petition No. 6455 of 1989.*

11th October, 1990.

*Punjab Khadi and Village Industries Board Act, 1955—S. 32-A—Constitution of India, 1950—Art. 12—Safidon Gram Udyog Samiti, a registered society, given loan by Haryana Khadi and Village Industries Board—Demand for recovery—Non-payment of loan resulting in Board's issuing recovery certificate under section 32-A—Vires of S. 32-A challenged—Expressions 'public demands' and 'other authorities'—Ambit—Board being a body created for the purpose of promoting economic interests of the people falls within the expression 'other authorities' and is, thus, State under Art. 12—Function of Board to advance loans under the Act falling within the ambit of 'public demands', State legislature is competent to legislate with regard to 'public demands'—S. 32-A is not ultra vires.*