

The High Court of Madhya Pradesh Bench at Indore

Case Number	W.P.No.8786/2021
Parties Name	M/s.Shanti Construction Vs. M/s.Aavantika Gas Ltd & Ors.
Date of Judgment	15/09/21
Bench	<u>Division Bench:</u> Justice Sujoy Paul Justice Anil Verma
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	YES
Name of counsel for parties	Shri.Prateek Maheshwari, learned counsel for petitioner. Shri Aniket Naik with Shri Pradyumna Kibe, learned counsel for respondents.
Law laid down	<p>1. <u>Constitution of India – Article 12</u> – Whether Avantika Gas Ltd (AGL) is an instrumentality/authority and amenable to writ jurisdiction of High Court. As per averments of reply of AGL - it is a public company limited - a joint venture of two PSUs namely GAIL and HPCL - government does not hold share in AGL “directly” - government has no pervasive/deep control in the “day to day affairs” of AGL- government has no direct share holding in AGL but through three PSUs which are not government itself and AGL is not performing any sovereign or public function.</p> <p>2. <u>Held</u> – Reply is artistically drafted – there is no absolute denial about control of government through PSUs. The defense is confined to day to day affairs of AGL etc.</p> <p>3. <u>Avatika Gas Limited</u> – whether is an authority/instrumentality of the State – It was held that Court can see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State. It was held that three PSUs were directly having significant share holding in AGL. PSUs senior officers are holding key/leading positions on deputation of AGL. The AGL is thus an agency/authority within</p>

	<p>the meaning of Article 12 of the Constitution.</p> <p>4. <u>Article 226 and Article of Association</u>– Three Central Government PSUs on whom Central Government has ultimate and effective control are having significant share holding in AGL. In addition, the AGL's objective shows that its duty have a public element in it.</p> <p>5. <u>Industrial Disputes Act</u> – First schedule – entry 29 of first schedule covers the activities of AGL. A conjoint reading of memorandum of association and entry 29 aforesaid shows that AGL is performing “public function”. Thus, it is amenable to writ jurisdiction.</p> <p>6. <u>Termination of contract and holiday listing/black listing</u> – in a contract of this nature cancellation of which has a public law element – writ jurisdiction can be invoked despite availability of remedy of arbitration. Once body is held to be covered under Article 12 of the Constitution and is amenable to the writ jurisdiction, the action/order of the said body must be judged on constitutional principles.</p> <p>7. <u>Doctrine of Proportionality</u> – The black listing order can be judged on the anvil of principles of natural justice and doctrine of proportionality. The petitioner completed 82.50% work (total 824 out of 1000 connections) could not have been visited with such a drastic order of cancellation of contract and holiday listing.</p> <p>8. <u>Alternative remedy/arbitration clause</u> – is not a bar for exercising writ jurisdiction.</p>
Significant paragraph numbers	21, 25, 27, 34, 29, 51.

ORDER
15.9.2021

Sujoy Paul,J.

This petition filed under Article 226 of the Constitution assails the order dated 11/1/2021 (Annexure P/10) passed by respondent No.2 whereby the contract was cancelled and the petitioner was put on ‘holiday listing’ for a period of two years with effect from 4/1/2021. This will deprive the petitioner from submitting his bid in future tenders during the holiday listing period. At the outset it is worth

noting that learned counsel for the parties agreed that effect of 'holiday listing' and 'black listing' is one and the same.

2. Shorn of unnecessary details, the relevant facts as stated by the petitioner are that the petitioner Firm is involved in business of infrastructure development in oil and gas pipe line projects for past several years. The respondents issued notice inviting tenders (NIT) on 11/10/2014 calling the contractor for laying MDPE pipe line network and PNG connections (Lar mild connectivity) in Ujjain city for supplying natural gas to domestic, commercial and industrial consumers for engagement of services on certain terms and conditions. The petitioner submitted his bid and succeeded in getting the contract. The work order dated 15/11/2014 is filed as Annexure P/4. The said contract was revised on 21/2/2018 through revised work orders dated 21/2/2018 and 3/6/2018 which are filed as Annexure P/5 and P/6.

3. The stand of petitioner is that right from 2014 when first work order was issued, petitioner deployed sufficient work force to fulfill the contractual obligation. Despite maximum efforts on the part of petitioner, the project work could not be completed because necessary work front was not provided by the respondents to the petitioner. The petitioner preferred several representations (Annexure P/7) to the respondents for the purpose of providing work front to the petitioner so that he can complete the work on its part. The petitioner averred that 82.50% work (total 824 out of total 1000 connections) were completed by the petitioner. Rest of the work could not be completed for want of work front in regard to completion of contract. Petitioner was all along ready and willing to complete the entire contractual work of 1000 connections within stipulated time. Petitioner is even ready today to complete the same in a very short span of time because only 176 connections remains due which could be completed on receipt of registration from respondents. Shri Prateek Maheshwari,

learned counsel for petitioner during the course of argument, repeatedly urged that given the opportunity, the petitioner can still complete the remaining work within short span of time and petitioner should be given an opportunity by the respondents to complete the same.

4. The respondents issued a show cause notice dated 10/9/2020 to the petitioner. In turn, petitioner submitted his detailed reply on 14/9/2020 (Annexure P/9). In turn, respondents passed the impugned order dated 11/1/2021 terminating the contract and placing the petitioner on 'holiday listing'. In this order, it is mentioned that no reply has been filed by the petitioner to the show cause notice whereas the clear stand of petitioner is that reply to the show cause notice was indeed filed and duly acknowledged by the respondents. In the return they have accepted that the finding in the impugned order that no reply has been filed by the petitioner is a typographical error on their part.

Petitioner's contention about maintainability:-

5. The parties are at loggerheads on the question of maintainability of this petition against the respondent company. To demonstrate that respondents are amenable to the writ jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner urged that respondent No.1 is a joint venture of Gas Authority of India Limited (GAIL) and Hindustan Petroleum Corporation Ltd (HPCL). Respondent No.1 is engaged in distribution of piped natural gas and compressed natural gas in the State of Madhya Pradesh. Both the public sector undertakings namely GAIL and HPCL which formed the joint venture are union government companies and respondent company is run by the Board which comprises of ex-officio government officers which continued to be parallelly employed by the government. The Central government has substantive share holding in the company, albeit indirectly through the two PSUs viz. GAIL and

HPCL. It is pointed out that respondent company proudly showcases on its website, on its letter head etc. in big bold and bright fonts immediately below its name that it is a joint venture of GAIL and HPCL. The Board of Directors of the Company, as provided on its website, have also been posted in the Board of the company on 'deputation' while holding their lien on their substantive posts in respective government companies. Such officers working on deputation with respondent No.1 are governed by the Conduct, Discipline and Appeal Rules which are applicable to the Central government employees or officers of All India Services. This shows that government through its representatives/officers has effective control over the functioning of respondent company making it an instrumentality/agency of State which is amenable to extra ordinary jurisdiction of this Court under Article 226 of the Constitution.

6. The activity of respondent company of distribution of natural gas both domestic and commercial is heavily promoted by government being one of the cheapest form of gas available in the country. The Ministry of Petroleum and Natural Gas, Government of India in a press release dated 18/12/2019 in the form of 'year end review of 2019' has stated that the government was engaged in promotion of CNG and was giving priority in allocation of PNG for supply to households and CNG in transport segment and further mentions its plans to expand coverage of such network through oil and gas companies and their joint ventures, subsidiaries etc. which presumably include the respondent No.1 company also. It is further argued that the functions of respondent company have also been included in the list of '**public utility services**' in the First Schedule of the Industrial Disputes Act, 1947 (ID Act) by issuance of notification bearing SO 1955(E) dated 20/6/2017, by substituting Entry 29 to state "29. *'processing or production or distribution of fuel gases' (coal gas, natural gas and the like)*". This brings the activities of the

respondent company in the same category as services of railways, port, dock, supply of water, electricity, public sanitation, postal services etc. u/S.2 (n) of the ID Act, 1947.

7. Furthermore, it is contended that respondent company had awarded the contract to the petitioner by following the process of issuance of tender and other steps which are scrupulously followed by the government and allied instrumentalities. Had it been a private entity, the respondent No.1 was under no obligation to issue NIT or follow the said due process. Lastly, to bring the respondents within the jurisdiction of this Court it is urged that the *memorandum of association* of respondent company (filed with returns) shows its objects *inter alia* - promotion of social and economic welfare, upliftment of public in rural areas, entering into contracts with the government to obtain rights, privileges and concessions, making donations to charitable objects of *inter alia* general public utility and *inter alia* lending aid and support for solving of labour problems and promotion of rural development and other social welfare and recreational activities. The cumulative effect of the aforesaid is that the respondent company falls within the ambit of 'instrumentality/agency' of State under Article 12 of Constitution of India and hence amenable to the writ jurisdiction. In support of these submissions, Shri Prateek Maheshwari placed reliance on *Binny Ltd Vs. Sadasivan & Ors AIR 2005 SC 3202*, *Anandi Mukta Saguru Shree AIR 1989 SC 1607*, *Ajay Hasia Vs. Khalid Mujid Sehravadi AIR 1981 SC 487* and *Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology (2002) 5 SCC 111*.

Against Holiday listing:-

8. On merits, it is submitted that NIT no where provides right to the respondents to 'blacklist' the petitioner or put it on 'holiday listing'. The holiday listing has drastic impact on the company. It deprives it from participating in government tenders in future. Such a

drastic order could not have been passed without following the principles of natural justice and without considering the reply of the petitioner. No reasons are assigned in the final order as to why reply so submitted by the petitioner did not suit the respondents. On the contrary, in the impugned order, it is mentioned that petitioner has not filed reply which runs contrary to record. The reliance is placed on the judgments of Supreme Court in *Kulja Industries Vs. Western Telecom Project, BSNL (2014) 14 SCC 731*, *Erusian Equipments & Chemicals Ltd (1975) 1 SCC 70*, *Ragunath Thakur Vs. State of Bihar (1989) 1 SCC 229* and *Gorkha Security Service Vs. State of NCT of Delhi (2014) 9 SCC 105*.

9. The petitioner placed heavy reliance on *Kranti Associates Pvt. Ltd. Vs. Mahmood Ahmed Khan (2010) 9 SCC 496* to bolster his submissions that impugned order is liable to be jettisoned solely because of absence of reasons. Learned counsel for petitioner has taken pains to contend that any action taken against the contractor must pass the test of 'doctrine of proportionality'. The respondents could not have ignored the quantum of work performed by the petitioner and could not have passed such an order of holiday listing in the factual back drop of the present case. Reliance is placed on *Teri Oat Estates P. Ltd. Vs. UT Chandigarh (2004) 2 SCC 130*. The scope of interference under Article 226 of Constitution even in contractual obligations is well defined and settled in view of judgment of Supreme Court in *Tata Cellular Vs. Union of India (1994) 6 SCC 651* and *Zonal Manager Central Bank of India Vs. Devi Ispat Ltd (2010) 11 SCC 186* is another submission.

10. The alternative remedy is not an absolute bar was clearly held in *Union of India Vs. Tania Constructions (2011) 5 SCC 697* and *Harbanslal Sahnia Vs. Indian Oil Corpn.Ltd AIR 2003 SC 2120*. Lastly, reliance is placed on the recent judgment of Supreme Court in *Vetindia Pharmaceuticals Limited Vs. State of Uttar Pradesh & Ors.*

Passed in Civil Appeal No.3647/2020 dated 6/11/2020 and an order of this Court in WP No.14677/2021 Virendra Singh Jadon Vs. State of M.P. & Ors. decided on 31/8/2021.

Stand of Respondents on maintainability:-

11. *Per contra*, Shri Aniket Naik, learned counsel for respondents submits that this petition is not maintainable against the respondent No.1 because it is neither 'State' nor 'authority' 'instrumentality/agency' under Article 12 of the Constitution of India. Respondent Aavantika Gas Ltd (AGL) is a public company Ltd. by shares constituted under the Companies Act, 1956. AGL is not a government company as defined under the Companies Act, 1956 as well as Companies Act, 2013. It is averred that AGL is a joint venture of two PSUs i.e. GAIL and HPCL. Clause 117 of articles of association was referred to contend that the property, business and affairs of the company are exclusively managed by the Board of the company. Clause 118 to 128 of Articles of Association shows that AGL is not controlled by the government financially, functionally or administratively. The aforesaid PSUs viz. GAIL and HPCL are not government in itself. The government has neither funded the AGL nor holds any share in AGL directly. The government has no pervasive and deep control of the AGL in its *day-to-day affairs* including managerial, administrative and commercial. The share holding of government in two PSUs does not amount to share holding of government in AGL. The HPCL has majority share holding of ONGC and GAIL has share holding of government. It is further averred that government has no *direct* share holding in AGL but necessarily through three PSUs which are not government in themselves. Thus, less than majority share holding fortifies absence of deep and pervasive control of government over the AGL in its *routine affairs* including the one like passing of impugned order and putting the contractor on holiday list. Thus, AGL is not amenable to the writ

jurisdiction of this Court. The stand of AGL is that it neither performs sovereign functions nor performs public functions. AGL does not perform any function which has any close relation with governmental function. The object and purpose of AGL is to distribute natural gas either in compressed form or through the pipe line. In both the eventualities, AGL does not become a public functionary because *firstly*, the government does not facilitate supply and distribution of natural gas and in furtherance, such facilitation has not been passed over by the government to the AGL and *secondly*, the AGL has voluntarily ventured the commercial activity of supply and distribution of natural gas. Similarly AGL does not enjoy monopoly in its commercial operation. It is merely an authorised distributor and supplier of natural gas being authorised by the Petroleum and Natural Gas Regulatory Board under Petroleum and Natural Gas Regulatory Board Act, 2006. Perhaps every natural gas distribution requires such authorisation under the said Regulatory Act, therefore, this feature does not bring the respondent within the definition of State or its instrumentality/authority/agency.

12. The another limb of argument relating to jurisdiction/maintainability is that the grievance of petitioner is arising out of a contractual/commercial transaction. Because of breach of contract if termination is set aside, it can at best fetch relief of compensation through remedy under the private law. Any action/order which is not significantly attached to perpetrate the public function/duty cannot be subject matter of judicial review in writ jurisdiction under Article 226 of the Constitution. Reference is made to *Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology (2002) 5 SCC 111*, *Jatya Pal Singh Vs. Union of India (2013) 6 SCC 452*, *Rajasthan State Electricity Board vs. Mohan Lal (1967) 3 SCR 377*, *Balmer Lawrie & Co. Ltd. Vs. Partha Sarathi Sen Roy (2013) 8 SCC 345*, *K.K. Saksena Vs. International*

Commission on Irrigation & Drainage (2015) 4 SCC 670, Ramakrishna Mission Vs. Kago Kunya (2019) 16 SCC 303.

13. Apart from the above, as per Clause 79 of General Conditions of Contract (GCC) the petitioner has a remedy to settle the dispute through arbitration. Every employer has an inherent power to black list the contractor or cancel his contract.

14. In support of aforesaid submissions, Shri Naik placed reliance on the judgments passed in the matters of *Patel Engg. Ltd. Vs. Union of India (2012) 11 SCC 257, Kulja Industries Ltd. Vs. Western Telecom Project BSNL (2014) 14 SCC 731, Biswanath Bhattacharya Vs. Union of India (2014) 4 SCC 392* and *Rashtriya Ispat Nigam Ltd. Vs. Verma Transport Co. (2006) 7 SCC 275.*

15. So far validity of impugned order dated 11/1/2021 is concerned, learned counsel for respondents submits that although in the impugned order it is erroneously mentioned that petitioner has not filed any reply, the reply of petitioner was duly considered by AGL which is evident in communication dated 18.08.2020 (Annexure R/5). The petitioner has suppressed this fact and did not file this communication along with the petition. This communication clearly shows that entire back ground is taken into account by the respondents while taking a decision on the reply to the show cause notice. This communication specifically refers about reply to the show cause notice dated 10.09.2020, and therefore, there is no flaw in the decision making process.

16. Shri Aniket Naik by placing reliance on the judgment of Supreme Court in **K.K. Saksena** (supra) submits that merely because certain officers of respondent company are government officers and working on deputation will not bring the respondents within the ambit of Article 12 of the Constitution.

17. No other point is pressed by the parties.

18. We have heard the parties at length and perused the record.

Findings On The Maintainability of Petition Under Article 226 of the Constitution of India:-

19. As noticed above, the parties have taken a diametrically opposite stand on the question of tenability of this writ petition. Thus, we deem it proper to first deal with this question which goes to the root of the matter.

20. Before dealing with the rival contention, it is apposite to take into account certain clauses of *memorandum of association*:-

“ 3 (a) To set up, maintain distribution systems, distribution networks, marketing networks, high pressure transmission systems, down stream of Custody transfer point provided by GAIL/ others at city gate stations, pressure reduction equipment, basic grids, district regulators, basic steel grids, medium density polyethylene distribution networks, interface systems, distribution pipeline networks, communication cables, conduit for communication cables, service lines, regulating lines, main lines and standby lines, isolation systems, valves, high pressure and low pressure distribution systems, pressure regulators, service regulators, gas meters, as required for carrying out the gas distribution to the domestic, commercial, industrial and automotive consumers, bulk users etc, and maintain delivery, dispensing facilities to automobiles.

3(b) Carrying out Auto LPG/CNG at retail outlet Allied Business as may be agreed by Parties from time to time, including not necessarily restricted to sale and marketing of Automotive Lubricants, setting up of Convenience Stores, providing facilities of Retro fitting of kits etc.

4. To appoint or open retail stores and wholesalers for selling the goods manufactured or imported or procured by the company and to deal as principals or as agents, distributors or as commission agents.

5. To buy wholesale or retails, repair, alter and exchange, let on hire, import and export all kinds of articles and things which may be required for the purpose of any of the main business or which are commonly manufactured, imported exported, supplied or dealt with by persons engaged in any such business or which may seem capable of being dealt with in connection with any of the main business.

9. To undertake, carry out, promote and sponsor rural development including any programmes for promoting the social and economic welfare or, the uplift of the public in

any rural area and to incur any expenditure or any programme of rural development and to assist execution and promotion thereof either directly or through an independent agency or in any other manner.

14. To enter into any arrangement with any Government or authority whether Municipal, local or otherwise or any person, that may seem conducive to the Company's objects or any of them; and to obtain from any such Government or authority any rights, privileges and concessions which the Company may think it desirable to obtain; and to carry out, exercise and comply with any such arraignments, rights, privileges and concessions.

34. To make donations to such persons or institutions either of cash or any other assets as may be thought directly or indirectly conducive to any of the Company's objects or otherwise expedient and also to subscribe, contribute or otherwise assist or guarantee money for charitable objects or institutions having scientific, religious or benevolent, national, cultural, educational or objects or general public utility.

35. To aid and support any person, association, body or movement, whose object is solution, settlement or surmounting of industrial or labour problems, of the promotion of science and technology, cultural activities, sports, environment, rural development and other social, welfare and recreational activities. To sponsor sports entertainment and other leisure and recreational activities, to aid and promote the Company's activities and other interests.

(emphasis supplied)

Following clauses of Article of Association of AGL are also noteworthy:-

54 (a) Transfer of Affiliate (s)

GAIL and HPCL, hereto, shall be entitled to transfer all or any part of its shares, to anyone or more of its Affiliate(s) after obtaining the consent of the other (HPCL and GAIL) in writing, which consent shall not be unreasonably withheld provided the transferee of such shares shall execute Deed of Adherence.

124. So long as holding of GAIL and HPCL is equal:-

(i) GAIL and HPCL shall have equal representations on the board.

(ii) Whole time Director of GAIL and whole time Director of HPCL shall be the Chairman of the Board of the company, on a rotational basis for a term of two (2) years.

(iii) The Managing Director of the Company and the Director (Commercial) shall be Directors not liable to retirement by rotation. GAIL shall in consultation with HPCL nominate one of its employee as the Managing Director of the company and HPCL shall in consultation with GAIL nominate one of its employees as the Director (Commercial) of the company, both of whom shall serve on a shall time basis.

(emphasis supplied)

21. The pleadings of respondents leaves no room for any doubt that as per their own stand respondent AGL is :-

- i) A public company limited under the Companies Act.
- ii) A joint venture of two PSUs namely GAIL and HPCL.
- iii) Government does not hold share in AGL '*directly*'.
- (iv) Government has no pervasive/deep control in the *day to day affairs* of AGL.
- (v) Government has no *direct* share holding in AGL but necessarily through three PSUs which are not government itself.
- (vi) The AGL is not performing any sovereign or public function.

22. Pertinently, in additional reply to additional rejoinder, it is clearly averred by AGL that as per the companys' master data and share pattern, GAIL has 51.83% of government share holding, HPCL has no government share holding directly but has 54.90% of ONGC share holding and ONGC has 60.41% of government share holding. So, respective share holding of government remotely through the said three PSUs viz GAIL, HPCL and ONGC is around 42.5% of share holding in respondent no.1, which is not substantial being less than 50%.

23. A seven judge bench in *Pradeep Kumar Biswas* (supra) opined that the picture that ultimately emerges is that the tests

formulated 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. 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.

24. Shri Aniket Naik, placed reliance on this para during the course of argument. A bare perusal of this paras shows that the discussion was as to whether an entity can be termed as 'State' within the meaning of Article 12 of the Constitution. It is not the case of the petitioner that the respondent-AGL is a 'State' as per Article 12 of the Constitution. Indeed, the stand of the petitioner is that it falls within the ambit of instrumentality/authority/agency as per Article 12 of the Constitution. However, we will examine the question of availability of necessary ingredient to being AGL in the purview of Article 12 in subsequent paras.

25. In *AIR 1986 SC 1571 (Central Inland Water Transport Corporation and Anr Vs. Brojo Nath Ganguly and Anr)*, which is affirmed by constitution bench in *Delhi Transport Corporation Vs. DTC Mazdoor Congress reported in 1991 (Supp) 1 SCC 600*, it was held that for the purpose of Article 12, one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or

agency of the State. In *Pradeep Kumar Biswas* (supra) also it was ruled that the question in each case would be based on relevant and cumulative facts relating to nature of constitution, function, financial, background and element and extent of control etc.

26. In *Jatya Pal Singh* (supra), the Apex Court considered the share holding pattern of the company namely VSNL. We will deal with this aspect little later. In *Rajasthan State Electricity Board* (Supra), the Electricity Board was held to be “other authority” in the concurring judgment of *J.C Shah, J.* In this view also, his lordship held that authorities constitutional or statutory invested with power by law but not sharing the sovereign power do not fall within the expression 'state' as defined in Article 12. Suffice it to say that this judgment is of no assistance to AGL because it is not the case of the petitioner that AGL is a 'State' within the meaning of Article 12 of the Constitution.

27. The reply and additional reply filed by the respondent clearly establishes that the AGL is a joint venture of two PSUs which are owned and controlled by the Central Government. The reply is artistically drafted by the AGL by employing sufficient linguistic engineering by stating that the Government does not hold share in AGL 'directly' and the government does not have pervasive and deep control 'directly' in the 'day to day affairs' of AGL. The element of pervasive control by Government is not denied in *toto*. In other words, importantly, there is no clear and complete denial about the pervasive control of the Government. On the contrary, it is stated that the government does not have “*direct control*” over its '*day to day affairs*' and government has

no '*direct*' share holding in AGL but has it through three PSUs which are not government itself.

28. A question cropped up before the Division Bench of Patna High Court in *Ashok Kumar Singh and Ors Vs Bihar Industrial and Technical Consultancy Organization Ltd and Ors*. Reported in *AIR 1998 PAT 9*, whether Bihar Industrial and Technical Consultancy Organization Ltd. (BITCO) is covered under article 12 of the Constitution. Apart from other factors which were taken into account by the Division Bench to hold that it indeed falls within the ambit of Article 12 of the Constitution was that entire share holding of BITCO is with statutory organizations which are State within the meaning of Article 12 of the Constitution and IDBI which is 'state' has deep and pervasive control over BITCO. *A.K Ganguli, J*, (as his lordship then was) speaking for the Division Bench opined:-

“26. This Court further holds that from the share holding of BITCO it is clear that the **entire share has been held by statutory organizations which are all States within the meaning of Article 12 of the Constitution of India. Apart from that this court is convinced that the IDBI which is undoubtedly a State has deep and pervasive control over the functions of BITCO.** From Article 104 of the Articles of Association of BITCO it appears that the IDBI shall be entitled to appoint 1/3rd of the total number of Directors of BITCO and shall be entitled to remove any or all of them from the office and appoint any other person thereto from time to time.

(emphasis supplied)

29. One of the factor on the strength of which the Patna High Court opined that BITCO is covered under Article 12 of the Constitution is that its entire shares were held by such bodies which are 'State' within the meaning of Article 12 of the

Constitution. Indisputably, GAIL, HPCL and ONGC do fall within the ambit of Article 12 of the Constitution being 'State' whether or not they are government in themselves.

30. In *Petronet LNG Ltd. Vs. Indian Petro Group passed in CS(OS) No.1102/2006*, the Delhi High Court opined as under:-

“64. Though the plaintiff disputes that it performs any governmental or public function, it does not deny being a company with an equity base of Rs.1200 crores, of which 50% is subscribed by Central Government Public Sector Undertakings. Although such undertakings are not majority equity holders, and narrowly miss that description by one percent, nevertheless, they have a **significant shareholding**. Equally, the plaintiff does not deny - rather it even asserts that the **negotiations conducted for the purpose of gas and allied products, are meant to service the needs of the community and the consumer base in India.** Understood in a broad sense, therefore, it **is engaged in a vital public function**. Its other shareholders are no doubt, non-state entities. Yet, there is a crucial public interest element in its functioning; 50% of . 1200 crores shareholding is controlled by the Public Sector understanding which are directly answerable to the Central government and parliament. Therefore, the claim for confidentiality had to be necessarily from the view of the plaintiff's accountability to such extent as well as its duties which have a vital bearing on the availability and presence of gas in the country. (Annexure J-3)”

(emphasis supplied)

31. In the above case, 50% share were subscribed by Government Public Sector Undertakings, which was less than the majority shares. This was held to be insignificant by taking into account the entirety of the matter, the public interest element, control of public sector undertakings on the respondent therein etc.

32. The Delhi High Court in *Indian Olympic Association Vs. Veeresh Malik (WP (C) No.876/2007)* opined thus:-

60. This court therefore, concludes that what amounts to substantial financial cannot be straight-jacketed into rigid formulae, of universal application. Of necessity, each case would have to be examined on its own facts. That the percentage of funding is not majority financing, or that the body is an impermanent one, are not material. Equity, that the institution or organization is not controlled, and is autonomous is irrelevant; indeed, the concept of non-government organization means that it is independent of any manner of government control in its establishment, or management. That the organization does not perform - or predominantly perform - public duties too, may not be materials, as the object for funding is achieving a felt need of a section of the public, or to secure larger societal goals.....”

(emphasis supplied)

33. The majority financing or share holding is not the crucial or determining factor for the purpose of deciding whether the entity is covered as an authority or instrumentality/agency of State. The aforesaid judgments of Delhi High Court were followed in *2019 SCC Online Delhi 9677 (Rajiv Agrawal Vs. Union of India)*. The nature of activity of respondent Petronet LNG Ltd in the said case were to a great extent similar to the activity of the present respondent (AGL). The Petronet LNG was a joint venture company to import LNG and set up LNG terminal in the country. Central Government PSUs namely GAIL, ONGC, IOCL and BPCL have 50% share equity in the *Petronet LNG Ltd*. The objection regarding maintainability raised by *Petronet LNG Ltd*. was over turned by the Delhi High Court keeping in view the cumulative aspects of nature of activities, public function element, government's indirect control,

administrative control by government officials working on deputation etc. A conjoint reading of these judgments of Delhi High Court leaves no room for any doubt that majority share holding is not the decisive factor. Indeed, significant share holding and financial involvement of Government and PSUs is sufficient to bring the entity within the ambit of Article 12 of the Constitution.

34. The entry 29 was inserted in the first schedule of Industrial Disputes Act (ID Act), which is wide enough to cover the activity of AGL. No amount of argument was advanced against this submission of the petitioner that in view of entry 29, there is no manner of doubt that activity of AGL is covered by 'public utility service' and therefore, it is performing 'public function'. The relevant clauses of *memorandum and article of association* reproduced hereinabove also makes it clear that the AGL is performing public function which also falls within entry 29 of first schedule aforesaid. As per the Judgment of the Apex Court in *Anandi Mukta Sadguru Shree* (supra) the term 'authority' used in article 226 of the Constitution must receive a liberal meaning unlike the term in Article 12 of the Constitution. It was held as under :-

“Article 226 confers power on the High Court 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. It is also held that if any private organization discharge public function and public duties a writ of mandamus can be issued under Article 226 of the constitution of India.”

(emphasis supplied)

35. In *Pradeep Kumar Biswas* (supra), the test laid down in previous pronouncements to understand the nature of instrumentality/agency was again considered by the Apex Court and it was held that The term instrumentality or agency of the State are not to be found mentioned in Article 12 of the Constitution. Nevertheless, they fall within the ken of Article 12 of the Constitution for the simple reason that if the State chooses to set up an instrumentality or agency and entrusts it with the same power, function or action which would otherwise have been exercised or undertaken by itself, there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. In different judicial pronouncements, it was held that, any company, corporation, society or any other entity having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a double or a proxy or a limb or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on - by whatever name called - of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an 'instrumentality' or 'agency' of the State.

36. The test laid down in *Ajay Hasia case* (supra) was further considered and in no uncertain terms it was made clear that “it will depend upon a combination of one or more of relevant factors depending upon the essentially and over whelming 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.”

37. In view of foregoing analysis, we are unable to persuade ourselves with the argument of Shri Aniket Naik, learned counsel for the AGL, that AGL is beyond the purview of Article 12 of the Constitution and it is not amenable to the writ jurisdiction of this Court. The nature of constitution of AGL, the element of financial control of Central Government through PSUs, its public utility nature activities (statutorily recognized in the teeth of entry 29 of first schedule of ID Act), the holding of senior/leading posts in AGL by officer of PSUs on deputation shows that in totality it definitely falls within the ambit Article 12 of the Constitution.

38. The judgment of *Balmer Lawrie and Company* (supra) (para 18) on which reliance is placed by Shri Naik deals with nature of 'sovereign powers'. The petitioner is not claiming that AGL is performing any sovereign nature of duties or exercising such powers and therefore, this judgment is of no assistance to the respondents. The judgment of *K.K Saksena* (supra) was relied upon to contend that even if a body or authority falls within the ambit of 'State' within the meaning of Article 12 of the Constitution, interference can be made if the Court is satisfied that the impugned action of such authority is in the domain of public law as distinguished from private law. If authority is not

discharging any public function or public duty which would not make it amenable to the writ jurisdiction, interference cannot be made. In the above paras, we have already held that the AGL is performing a 'public function'.

Public Function:-

39. The test to decide whether an entity is performing public function is clearly laid down. The Apex Court in *Jatya Pal Singh* (supra) considered the legal journey and even taken note of *Union Kingdom Human Rights Act, 1998* (meaning of public function/bill and deduced in writing certain factors which may be taken into account for determining the question as to whether a function is a function of public nature. Few of them which are relevant and can be pressed into service in the instant case are :-

1. (a)
- (b)
- (c) The nature and extent of the public interest in the function in question.
- (d)
- (e) The extent to which the State, directly or indirectly, regulates, supervises or inspects the performance of the function in question.

Section 6 (3)(b) of the **Human Rights Act, 1998** provides that a function of public interest includes a function which is required or enable public function wholly or partially at public expense, irrespective of :-

2. (a) The legal status of the person who performs the function or,
- (b) Whether the person performs the function by reason of a contractual or other agreement or arrangement.

In *Binny Ltd* (supra), the Apex Court opined as under :-

“It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.”

(emphasis supplied)

In *Jatya Pal Singh* (supra), the Apex Court ruled about “public function” as under :-

“This Court also quoted with approval the Commentary on **Judicial Review of Administrative Action** (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24 therein it has been stated as follows : (Binny Ltd case SCC p 666, para 11)

A body is performing a public function when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyds of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to recognize the realities of executive power and not allow their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted. Non-governmental bodies such as these are just as capable of abusing their powers as is government

(emphasis supplied)

40. The contract which has been cancelled by the impugned order was a contract to provide gas connection to domestic, commercial and industrial consumers in furtherance of decision of the Government to save energy. The contract has a clear nexus with public function. Through aforesaid contract, the object of providing gas to citizen was sought to be achieved. Thus, we are unable to hold that it does not have any public law element. For this reason, the judgment of *K.K Saksena* (supra) is of no help to the respondents.

41. The contract of a purely private nature cannot be interfered merely by a reason of the fact that they are structured by statutory provisions is the principle laid down in *Ram Krishna Mission* (supra). An exception is carved out where contract of service is governed by statutory provision. Suffice it to say that this judgment is also not applicable for the simple reason that contract herein cannot be said to be having completely private in nature. The grant of contract and cancellation thereof, in the instant case, certainly has public function/public law element in it.

42. In view of foregoing analysis, in our view, the respondent AGL is amenable to the writ jurisdiction of this Court under Article 226 of the Constitution being an instrumentality/agency of the State. Thus, the objection of AGL regarding maintainability deserves to be rejected.

Whether Holiday Listing is Proper/Legal-

43. This is trite that a holiday listing/black listing order can be called in question mainly on the basis of decision making process adopted by employer on the touch stone of principles of natural justice and on the aspect of proportionality. Indisputably, the

petitioner was put to a show cause notice. In turn, the petitioner submitted his reply. The petitioner in his reply narrated the factual backdrop and put forth his defense on merits. In the impugned order, the respondents have not considered the reply at all. It was mentioned in the order dated 11.01.2021 (Annexure P/10) in specific that the petitioner has not filed any reply which averment is admittedly incorrect and contrary to record.

44. Learned counsel for the respondent placed heavy reliance on communication dated 18.08.2020 Annexure R/5 to contend that reply to show cause notice was considered in this communication. A plain reading of this communication shows that but for mentioning the date of reply, no averment of reply was specifically dealt with and considered. Putting it differently, the respondent-AGL has not considered averments of reply and has not assigned any reason as to why the said reply did not suit it. This shows that no reasons are assigned for not accepting the reply. This clearly runs contrary to principles of natural justice. In *Kranti Associates* (supra), the Apex Court emphasized the need of assigning reasons in administrative, quasi-judicial and judicial functions.

45. In *Kulja Industries* it was held as under:-

“This implies that any such decision will be open to scrutiny not only on the touchstone of the principles of natural justice but also on the doctrine of proportionality. A fair hearing to the party being blacklisted thus becomes an essential pre-condition for a proper exercise of the power and a valid order of blacklisting made pursuant thereto. The order itself being reasonable, fair and proportionate to the gravity of the offence is similarly examinable by a writ Court. The legal position on the subject is settled by a long line of decisions rendered by this Court starting with *Erusian Equipment &*

Chemicals Ltd. v. State of West Bengal and Anr. (1975) 1 SCC 70 where this Court declared that blacklisting has the effect of preventing a person from entering into lawful relationship with the Government for purposes of gains and that the Authority passing any such order was required to give a fair hearing before passing an order blacklisting a certain entity. This Court observed:

20. Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

18. Subsequent decisions of this Court in M/s Southern Painters v. Fertilizers & Chemicals Travancore Ltd. and Anr. AIR 1994 SC 1277; Patel Engineering Ltd. Union of India (2012) 11 SCC 257; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. & Ors. (2006) 11 SCC 548; Joseph Vilangandan v. The Executive Engineer, (PWD) Ernakulam & Ors. (1978) 3 SCC 36 among others have followed the ratio of that decision and applied the principle of audi alteram partem to the process that may eventually culminate in the blacklisting of a contractor.

(emphasis supplied)

46. In ***Gorkha Security Services***, the *ratio decidendi* of ***Kulja Industries*** (supra) was followed.

47. In recent judgments in ***UMC Technologies Pvt. Ltd. (2021) 2 SCC***, the Apex Court held as under:-

“14. Specifically, in the context of blacklisting of a person or an entity by the state or a state corporation, the requirement of a valid, particularized and unambiguous show cause notice is particularly crucial due to the severe consequences of blacklisting and the stigmatization

that accrues to the person/entity being blacklisted. Here, it may be gainful to describe the concept of blacklisting and the graveness of the consequences occasioned by it. Blacklisting has the effect of denying a person or an entity the privileged opportunity of entering into government contracts. This privilege arises because it is the State who is the counter party in government contracts and as such, every eligible person is to be afforded an equal opportunity to participate in such contracts, without arbitrariness and discrimination. Not only does blacklisting takes away this privilege, it also tarnishes the blacklisted persons reputation and brings the persons character into question. Blacklisting also has long-lasting civil consequences for the future business prospects of the blacklisted person.

15. In the present case as well, the appellant has submitted that serious prejudice has been caused to it due to the Corporations order of blacklisting as several other government corporations have now terminated their contracts with the appellant and/or prevented the appellant from participating in future tenders even though the impugned blacklisting order was, in fact, limited to the Corporations Madhya Pradesh regional office. This domino effect, which can effectively lead to the civil death of a person, shows that the consequences of blacklisting travel far beyond the dealings of the blacklisted person with one particular government corporation and in view thereof, this Court has consistently prescribed strict adherence to principles of natural justice whenever an entity is sought to be blacklisted.”

(emphasis supplied)

48. The common string in these judgments is that the 'black listing' has a severe effect on the Contractor. The Contractor, therefore, cannot be crucified without following the principles of natural justice and 'due process'. In our opinion, the decision making process adopted by the respondents is bad in law and

runs contrary to principles of natural justice. The impugned order dated 11.01.2021 is therefore, liable to be interfered with.

49. In the judgment of *Kulja Industries* (supra), (interestingly cited by both the sides), it was further held that apart from principles of natural justice, interference can be made by the Courts based on the *Doctrine of Proportionality*.

50. The doctrine of proportionality exists in India from time immemorial. This doctrine is applied by Courts in criminal cases on regular basis. The principle is that one cannot be visited with an extreme order / punishment which is not commensurate to the conduct / misconduct /offence. It is noteworthy that first separate rock edict of emperor **Ashoka at Dholi** shows that Ashoka expressed his anxiety that undeserved and harsh punishment should not be imposed.

Dharmakosa contains a *Shloka*:

अपराधानुरूपं च दण्डं दण्डयेषु दापयेत् ।

सम्यग्दण्डप्रणयनं कुर्यात् ।

द्वितीयमपराधं न कस्यचित् क्षमेत् ।

Let the king inflict punishments upon the guilty (i) **corresponding to the nature** (gravity) **of the offence** (ii) **according to justice** and (iii) not pardon anyone who has committed the offence for the second time.

Although the said *Shloka* relates with punishment, the analogy can be drawn for examining aspect of proportionality in administrative action as well. (See: page no.338-339 of Legal and Constitutional History of India by Justice M.Rama Jois)

51. Based on this Doctrine also, we find substance in the arguments of learned counsel for the petitioner that in view of the quantum of work already performed by the petitioner, the impugned order is extremely disproportionate whereby the

contract of petitioner was cancelled and he was also put to holiday list. We find support in our view from the judgment of the Apex Court in *Teri Oat State Pvt Ltd* (supra).

52. Once it is held that a body is an agency/instrumentality within the meaning of article 12, the action of the said body must be judged on the anvil of Constitutional principles. Such body does not have any unfettered discretion in the matter of grant and cancellation of contract etc. The order of black listing can be passed with due regard to the constitutional principles flowing from article 14 of the Constitution. It is apt to remember that “law has reached its finest moment when it has freed man from the unlimited discretion where discretion is absolute, man has always suffered.” (stated **Douglas, J** in *United States Vs. Wunderlich*, (342 US 98 (1951) quoted with profit by the Apex Court in (2012)10 SCC 1 (Natural Resources Allocation, In Reference, Special Reference No.1/2012)

53. The respondents have raised yet another objection regarding availability of alternative remedy/arbitration clause. In view of judgment of the Apex Court in *Zonal Manager Central Bank of India* (supra), *Union of India Vs. Tania Construction* (supra) and *Harbanslal Sahnia* (supra) the writ petition of this nature can very well be entertained despite availability of alternative remedy/arbitration clause.

54. In view of above discussion, the impugned order dated 11.01.2021 Annexure P/10 cannot sustain judicial scrutiny.

55. Resultantly, the order dated 11.01.2021 is set aside. The respondent shall provide work front in single go to the petitioner with a reasonable time and shall allow the petitioner to complete the contract within the aforesaid time.

56. The petition is **allowed**.

(Sujoy Paul)
Judge

(Anil Verma)
Judge