

CASE NO.:
Appeal (civil) 3272 of 2003

PETITIONER:
LT. GOVERNOR OF DELHI & ORS

RESPONDENT:
V.K. SODHI & ORS

DATE OF JUDGMENT: 14/08/2007

BENCH:
P.K. BALASUBRAMANYAN & P.P. NAOLEKAR

JUDGMENT:
J U D G M E N T

[with C.A. No. 8132 of 2003]

P.K. BALASUBRAMANYAN, J.

1. In this appeal, the challenge is to the decision of the Delhi High Court holding that the State Council of Education, Research and Training ('SCERT' for short) is a State within the meaning of Article 12 of the Constitution of India and the conclusion that the Lieutenant Governor of Delhi, SCERT and others are bound to implement the policy decision of SCERT as reflected in Regulation 67 framed by it as also the Advanced Career Promotion Scheme. But a caveat was entered that those who have not been absorbed, cannot be given the benefit of the decision unless they are absorbed permanently in SCERT. The writ petition was allowed on the above terms with costs.

2. We may notice that the writ petition was not allowed as prayed for nor was a mandamus as such issued to the respondents. The prayer in the writ petition was for the issue of a writ of mandamus or any other suitable writ, order or direction to the respondents to extend the benefits of pension, gratuity and general provident fund on retirement in favour of the writ petitioners, to provide facilities of loan, advances for betterment of career, status and life in terms of housing loan, car loan, computer loan etc. in favour of the writ petitioners and also to extend the benefits of the same pay and allowances in favour of the writ petitioners as are admissible to the academic staff of National Council of Educational, Research and Training ('NCERT' for short) at par or to pass any other order or direction as may be deemed fit and proper. It may be noticed that Regulation 67 of SCERT Rules and Regulations which provided that the terms and tenure of service of the academic staff at the Council shall remain the same as available for the academic staff of NCERT was amended by notification dated 7.12.1999 retrospectively to the effect that the terms and tenure of service of academic and other staff of the Council should remain the same as available for the academic and other staff of the Directorate of Education, G.N.C.T. of Delhi with such

modifications that may be specifically adopted by the Executive Committee from time to time. This amendment was not challenged in the writ petitions in the context of the prayers in the writ petition. But in the context, it is clear that the High Court has issued a direction to SCERT to implement Regulation 67 as it stood prior to its amendment in respect of a class of employees and to implement certain resolutions adopted by the Governing Committee of SCERT. We may incidentally notice and it is the common case, that the unamended Regulation 67 had never been implemented in SCERT in respect of any of its employees and there is no case of any discrimination in the implementation of that Regulation.

3. While allowing the writ petition, the High Court negatived the plea of SCERT that it was merely a society registered under the Societies Registration Act and it was not a State within the meaning of Article 12 of the Constitution of India. The High Court also overruled the plea of SCERT that it mainly relied on the grant by the Government for the purpose of achieving the objects with which the society was formed and without the sanction or approval of the State Government, it was not in a position to spend any part of the grant by way of additional benefits to its employees. It is feeling aggrieved by the decision thus rendered by the High Court that this Appeal has been filed.

4. We may notice here that the High Court held that the decision by this Court in Chander Mohan Khanna Vs. N.C.E.R.T. & ors. [(1991) 4 S.C.C. 578] could not govern the case of SCERT in view of the decision in Pradeep Kumar Biswas Vs. Indian Institute of Chemical Biology & ors. [(2002) 5 S.C.C. 111] and in that view, it was held that the Society was a State and that the amendment of the Regulation would not affect the employees who had joined SCERT prior to the date of the amendment.

5. It is argued on behalf of the appellants that the High Court was clearly in error in not properly examining the question whether SCERT was a State or other authority within the meaning of Article 12 of the Constitution of India even going by the principle laid down in Pradeep Kumar Biswas's case (supra). It was further submitted that the High Court has given no reasons for holding that the decision in Chander Mohan Khanna could not be applied to the case in view of the position emerging from the bye-laws of both the societies. It was submitted that going by the tests laid down, SCERT was a society registered under the Societies Registration Act, which was a master of its affairs and which was not subservient to the Government and that the Government did not have effective or pervasive control over the working of the society which was governed by a Committee constituted by its bye-laws and the mere fact that the Government was making available grants to SCERT and SCERT was entrusted with the looking after of a facet of education, which was part of the duty of the State and the existence of some ex officio members in the Committee are not sufficient to uphold the plea that SCERT was a State especially since in Pradeep Kumar Biswas case, the decision in Chander Mohan Khanna had not been overruled and

only one aspect relied on in Chander Mohan Khanna decision had been found to be not sustainable. The respondents, on the other hand, contend that the larger bench in Pradeep Kumar Biswas's case had specifically overruled Sabhajit Tewary's case [(1975) 1 S.C.C. 485] and this meant that the decision in Chander Mohan Khanna was no more good law and the High Court was right in its conclusion on that basis. It is further submitted that going by the tests laid down by this Court in various decisions, it has to be held that SCERT was a State or other authority within the meaning of Article 12 of the Constitution in view of the financial control the State Government had over the Society and the other circumstances relied on by the High Court. Thus, it was submitted that the High Court was justified in directing the implementation of Regulation 67 as it stood in respect of the writ petitioners.

6. On merits, it was contended on behalf of the appellants that the High Court was in error in ignoring the financial implications for the society while issuing the direction and that the court is not entitled to ignore the financial constraints of a society like SCERT while called upon to issue a direction to it to incur additional expenditure, eating up a major portion of the grant that is made available to it by the Government. It is submitted that if a major portion of the grant is utilized for salaries and allowances and other benefits to the employees, the very object with which the society was formed would be defeated and certainly, a court is bound to consider that aspect while issuing directions for incurring of financial liability. It is also pointed out that Regulation 67 had been amended with retrospective effect and the same was not in challenge before the High Court and there was no justification in the High Court holding that the non-existent Regulation 67 as it existed prior to the amendment, should be implemented in respect of the writ petitioners.

7. These submissions are sought to be met by the respondents by contending that the employees were entitled to benefit on the principle of 'equal pay for equal work', that the original Regulation 67 applied to employees who were in service prior to its amendment and that the High Court was right in holding that the retrospective amendment of Regulation 67 could not affect the employees who were in place before the date of the amendment. Learned counsel further submitted that the direction issued by the High Court was only to direct SCERT to implement its own resolutions without waiting for governmental clearance for their implementation and considering that SCERT was an autonomous body, the direction in that behalf was justified. It was thus submitted that the appeal was liable to be dismissed.

8. Civil Appeal No. 8132 of 2003 is filed by SCERT challenging a direction subsequently issued by the High Court in another writ petition following the decision of the Division Bench giving rise to Civil Appeal No. 3272 of 2003. The fate of this Appeal depends upon the decision in Civil Appeal No. 3272 of 2003 and no separate discussion of the facts therein is needed.

9. As the decisions of this Court show, there is no simple litmus test, to determine whether an entity is a

State or other authority within the meaning of Article 12 of the Constitution of India. What is clear from the decisions is that the various facets of the foundation and the working of the entity would be relevant in determining the question in the context of the duties entrusted to it or taken up by it for performance. It is in that context that in the latest larger Bench decision in Pradeep Kumar Biswas (supra), the majority summed up the position in paragraph 40 thus:-

"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."

What therefore falls for consideration is whether in the context of the functions entrusted to it, the rules and bye-laws that govern it and the financial position enjoyed by it, SCERT can be said to be financially, functionally and administratively dominated by or under the control of the Government.

10. It is in this context that the decision in *Chander Mohan Khanna* (supra) assumes importance. It appears to be common case that SCERT and NCERT are organizations parallel in nature and the High Court has also recorded:
"It is accepted that the third respondent (SCERT) was formed basically on the same lines as NCERT."

This Court in *Chander Mohan Khanna* (supra) on discussing the relevant provisions of the Memorandum of Association and the Rules of NCERT came to the conclusion that NCERT was not a State or other authority within the meaning of Article 12 of the Constitution of India. This Court after quoting from the decision of the High Court regarding the relevant Rules of NCERT stated:

"The object of the NCERT as seen from the above analysis is to assist and advise the Ministry of Education and Social Welfare in the implementation of the Governmental policies and major programmes in the field of education particularly school education. The NCERT undertakes several kinds of programmes and activities connected with the coordination of research extension services and training, dissemination of improved educational techniques, collaboration in the educational programmes. It also undertakes

preparation and publication of books, materials, periodicals and other literature. These activities are not wholly related to Government functions. The affairs of the NCERT are conducted by the Executive Committee comprising of Government servants and educationists. The Executive Committee would enter into arrangements with Government, public or private organisations or individuals in furtherance of the objectives for implementation of programmes. The funds of the NCERT consist of: (i) grants made by the Government, (ii) contribution from other sources and (iii) income from its own assets. It is free to apply its income and property towards the promotion of its objectives and implementation of the programmes. The Government control is confined only to the proper utilisation of the grant. The NCERT is thus largely an autonomous body."

Their Lordships concluded that in their Lordships' opinion having regard to the indications to which they had called attention earlier, NCERT did not qualify as a State under Article 12 of the Constitution of India. The provisions of the Memorandum of Association and the bye-laws of SCERT are more or less the same as that of NCERT. Whereas NCERT was to assist the National Government in the matter of coordinating education, SCERT was to assist the State Government in the matter of promoting education within the State of Delhi. It is also governed by an Executive Committee. The income and property of the Council however derived has to be applied towards the promotion of the objectives set forth in the Memorandum of Association. The membership of the Council included ex officio the Lieutenant Governor of Delhi, the Executive Councilor (Education) of Delhi Administration and various educational authorities. The Executive Committee was to be the main authority of the Council and it was entitled to create or constitute other authorities for carrying out the objectives. The affairs of the Committee shall be administered subject to the rules and orders of the Council by an Executive Committee which was to consist of various officers of the Delhi Administration. The Committee had the power, with the previous approval of the Council, to frame Regulations including Regulations regarding terms and tenure of appointments, emoluments, allowances, rules of discipline and other conditions of service of the officers and the staff of the Council. The Council was to be fully financed by the Government and the funds of the Council was to consist of grants made by the Administration of Delhi/Delhi State and Government of India for the furtherance of the objects of the Council, contributions from other sources, income from assets and publication of the Council and receipt of the Council from other sources. The accounts had to be audited annually by Chartered Accountants and to be approved by the Annual General Meeting of the Council. The State Government had no role to play on the administration of the Council or in the working of the Council or over its finances, once the grant was made.

11. The two elements, one, of a function of the

State, namely, the coordinating of education and the other, of the Council being dependant on the funding by the State, satisfied two of the tests indicated by the decisions of this Court. But, at the same time, from that alone it could not be assumed that SCERT is a State. It has to be noted that though finance is made available by the State, in the matter of administration of that finance, the Council is supreme. The administration is also completely with the Council. There is no governmental interference or control either financially, functionally or administratively, in the working of the Council. These were the aspects taken note of in Chander Mohan Khanna (supra) to come to the conclusion that NCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India. No doubt, in Chander Mohan Khanna (supra), the Bench noted that the fact that education was a State function could not make any difference. This part of the reasoning in Chander Mohan Khanna (supra) case has been specifically disapproved by the majority in Pradeep Kumar Biswas (supra). The majority noted that the objects of forming Indian Institute of Chemical Biology was with the view of entrusting it with a function that is fundamental to the governance of the country and quoted with approval the following passage in Rajasthan SEB Vs. Mohan Lal [(1967) 3 S.C.R. 377]:

"The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people."

The majority then stated:

"We are in respectful agreement with this statement of the law. The observations to the contrary in Chander Mohan Khanna V. NCERT relied on by the learned Attorney-General in this context, do not represent the correct legal position."

12. But, it may be noticed that in conclusion, the majority only overruled the decision in Sabhajit Tewary (supra) and did not say anything further regarding the decision in Chander Mohan Khanna (supra).

13. We also find substantial differences in the two set ups. Sabhajit Tewary (supra), after referring to the rules of the Council of Scientific and Industrial Research which was registered under the Societies Registration Act, concluded that it was not a State within the meaning of Article 12 of the Constitution. While overruling the said decision, the majority in Pradeep Kumar Biswas (supra) took the view that the dominant role played by the Government of India in the governing body and the ubiquitous control of the Government in the Council and the complete subjugation of the Governing Body to the will of the Central Government, the inability of the Council to lay down or change the terms and conditions of service of its employees and the inability to alter any bye-law without the approval of the Government of India and the owning by the Central Government of the assets and funds of the Council

though normally owned by the society, all indicated that there was effective and pervasive control over the functioning of the Council and since it was also entrusted with a Governmental function, the justifiable conclusion was that it was a State within the meaning of Article 12 of the Constitution. The majority also noticed that on a winding up of that Council, the entire assets were to vest in the Central Government and that was also a relevant indication. Their Lordships in the majority also specifically overruled as a legal principle that a Society registered under the Societies Registration Act or a company incorporated under the Companies Act, is by that reason alone excluded from the concept of State under Article 12 of the Constitution. In the case of SCERT, in addition to the operational autonomy of the Executive Committee, it could also amend its bye-laws subject to the provisions of the Delhi Societies Registration Act though with the previous concurrence of the Government of Delhi and that the proceedings of the Council are to be made available by the Secretary for inspection of the Registrar of Societies as per the provisions of the Societies Registration Act. The records and proceedings of the Council have also to be made available for inspection by the Registrar of Societies. In the case of dissolution of SCERT, the liabilities and assets are to be taken over at book value by the Government of Delhi which had to appoint a liquidator for completing the dissolution of the Body. The creditors' loans and other liabilities of SCERT shall have preference and bear a first charge on the assets of the Council at the time of dissolution. This is not an unconditional vesting of the assets on dissolution with the Government. It is also provided that the provisions of the Societies Registration Act, 1860 had to be complied with in the matter of filing list of office-bearers every year with the Registrar and the carrying out of the amendments in accordance with the procedure laid down in the Act of 1860 and the dissolution being in terms of Sections 13 and 14 of the Societies Registration Act, 1860 and making all the provisions of the Societies Registration Act applicable to the Society. These provisions, in our view, indicate that SCERT is subservient to the provisions of the Societies Registration Act rather than to the State Government and that the intention was to keep SCERT as an independent body and the role of the State Government cannot be compared to that of the Central Government in the case of Council of Scientific and Industrial Research.

14. As we understand it, even going by paragraph 40 of the judgment in Pradeep Kumar Biswas (supra), which we have quoted above, we have to consider the cumulative effect of all the facts available in the case. So considered, we are inclined to hold that SCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India. As we see it, the High Court has not independently discussed the relevant rules governing the functioning and administration of SCERT. It has proceeded on the basis that in the face of Pradeep Kumar Biswas (supra) decision, the decision in Chander Mohan Khanna (supra) must be taken to be overruled and no further discussion of the question is necessary. But, in our view, even going by Pradeep Kumar Biswas (supra), each case has to be considered with reference to the facts available for determining whether the body concerned is a State or other authority within the

meaning of Article 12 of the Constitution of India. So considered, we find that the Government does not have deep and pervasive control over the working of SCERT. It does not have financial control in the sense that once the finances are made available to it, the administration of those finances is left to SCERT and there is no further governmental control. In this situation, we accept the submission on behalf of the appellants and hold that SCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India. After all, the very formation of an independent society under the Societies Registration Act would also suggest that the intention was not to make the body a mere appendage of the State. We reverse the finding of the High Court on this aspect.

15. Once we hold that SCERT is not a State or other authority within the meaning of Article 12 of the Constitution of India, we do not find ourselves persuaded to issue any such direction as sought for by the writ petitioners (the respondents herein). In fact, it becomes unnecessary to go into the question of validity of the amendment of Regulation 67, the effect of the uniform non implementation of Regulation 67 as it stood earlier, and the effect of the absence of a challenge in the writ petition to the amendment to the Regulation itself. It is also not necessary to go into the question whether SCERT should seek the permission of the Government for incurring additional expenditure in terms of service benefits to its employees.

16. It appears to us that in the case of bodies like SCERT, the court cannot ignore the financial implications of implementing the directions that it is called upon to issue. The object of SCERT is laudable and it has to coordinate and promote education in the State. Its resources are limited and the main income is by way of grant from the State Government. When SCERT pleads that it cannot spend the whole of the grant or a major portion of the grant in paying salaries and emoluments to its employees and if it does so, that may tend to frustrate the very object with which the society was formed, it is an argument that has to be considered weighty by a court called upon to exercise jurisdiction under Article 226 of the Constitution of India. A court cannot issue a direction which would tend to frustrate the very object with which a society like SCERT is formed or a body like SCERT is created. After all, there may be a point of time in a welfare State where the right of the employees must be subservient to the right of the society. In the matter of education, surely, the interests of the society at large should prevail and issue of any direction that may endanger such interests must be done with extreme caution and only after careful deliberation.

17. In our view that SCERT is not a State or other authority within the meaning of Article 12 of the Constitution and normally not amenable to the jurisdiction of the High Court under Article 226 of the Constitution of India, we do not find it necessary to pursue further, these other aspects. Suffice it to say, that the direction issued by the High Court cannot be sustained.

18. In the result, both the appeals are allowed and the directions issued by the High Court are set aside and the writ petitions filed by the writ petitioners are dismissed. In the circumstances, the parties are directed to suffer their respective costs.

JUDIS