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PUBLIC SECTOR ENTERPRISES NOT WITHIN ‘ARTICLE 12’: A CRITICAL ANALYSIS

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ABSTRACT
In the era of privatisation and globalisation, there has been a shift towards PPP (Public Private Partnership) from socialist economy. The current economic model of privatising ‘sick’ public sector enterprises is to recover from debts and losses and to focus towards generating profits. It is the PPP model that has changed the contours of our economy and based on this model the expression of ‘other authorities’ within the definition of “State” under Article 12137 of the Indian Constitution requires reconsideration. The Hon’ble Supreme Court has been expanding the term ‘other authorities’ through various judicial decisions over the years and has given a wide ambit to it. The inclusion of public enterprises as an instrumentality or agency of the state has increased the scope of judicial scrutiny over the functioning of these enterprises. It has opened floodgates of writs and PIL’s over alleged infringement of fundamental rights. The wide scope of judicial review over the acts and omissions of public sector enterprises has affected the efficiency and functioning of these public enterprises. It has rendered impossible to implement effective rules for proper managerial functioning of these enterprises and handicap public enterprises severely in a competitive world. Judicial intervention in the form of stay orders over alleged violation of fundamental rights necessarily obstructs the smooth functioning of business of these enterprises. The researcher highlights in this paper that fundamental rights and efficient functioning of the public enterprises are antithetical to each other where one has to forego for the other.

Keywords: Privatisation, Public-Private Partnership, Article 12, Public sector enterprises.

PUBLIC SECTOR ENTERPRISES NOT A - ‘STATE’
After Independence, Prime Minister J. Nehru led government favoured the ownership and control of key sectors in the hands of the government. Over the next six decades Indian economy has moved from socialistic pattern to mixed pattern and now successive governments have focussed on the PPP (Public-Private Partnership) model where profit-making private firms play a vital role in reviving the public enterprises which suffer from burden of debts and losses. Presently, the Union government policy on disinvestment and Foreign Direct Investment (FDI) in key public sectors like petroleum and natural gas.

137 Article 12, Constitution of India.
defence, aviation, telecom paved the way for private firms to enter public sector enterprises. This would provide an equal opportunity to the private firms holding shares in the public enterprises to have a say in the functioning of these enterprises. One such example of Public Private Partnership (PPP) is between HPCL (Hindustan Petroleum Corporation Limited) and Mittal Energy Limited owned by Mr Lakshmi Mittal in Natural Oil and Gas sector. In light of the present model of Public Private Partnership (PPP) through privatisation and foreign direct investment (FDI), one needs to reconsider whether the PPP model falls in line with the five tests laid down by the Hon’ble Supreme Court in *Ajay Hasia v Khalid Mujib*\(^{138}\), so as to hold any authority as an agency or instrumentality of the State. These five factors include:

1. Entire share capital of the authority is held by government.
2. Almost entire expenditure of the authority is financially assisted by state
3. Monopoly status of the authority conferred by state
4. Deep and Pervasive control by state over the functions of the authority
5. Authority performs public functions or closely related to governmental functions

Although the above tests are not exhaustive but only indicative or illustrative. It is for the courts to decide in each case whether the body in question falls within the purview of Article 12. In January 2018, the Central government has accelerated efforts to privatise at least 30 Central Public-Sector Undertakings (PSUs) including national carrier Air India\(^{139}\). According to a leading daily newspaper, the National Democratic Alliance (NDA) government has invited Expressions of Interest from potential buyers to acquire a 76% stake in Air India and further decided to sell 100% of its low-cost international carrier Air India Express\(^{140}\). Keeping in mind of disinvestment and FDI policy of the NDA government to privatise central public-sector enterprise (CPSU) which are regarded as authorities of State within the meaning of Article 12, the researcher personally feels that the PPP model which is adopted to replace ‘State’ controlled public enterprises does not satisfy the test as laid down in Ajay Hasia case. In PPP model, divestment policy requires the government to sell a certain percentage of shares in favour of the private enterprises. Hence, the entire share capital is divided in a certain ratio between government and private enterprises and not wholly held by

\(^{138}\) AIR 1981 SC 487

\(^{139}\) *BJP Government moves to privatise 30 PSUs Including Air India*, News Click (10/01/2018), available at https://www.newsclick.in/bjp-government-moves-privatise-30-psus-including-air-india , last seen on 10/08/2018.

government. Furthermore, the deep and pervasive control by State also cease to exist with the introduction of privatisation policy through divestment of government shares and allowing foreign private firms to enter public sectors through FDI routes. Moreover, the financial assistance by ‘State’ also gets diluted with the advent of privatisation. Finally, the aim of private firms towards profit making also seem to go against the public function doctrine and after the liberalization of our economy in 1991, the question of monopoly does not arise in any sector except Railways, atomic energy.

A seven judge Constitution Bench of the Supreme Court in Pradeep Kumar Biswas v. Indian Institute of Chemical Biology141 ruled that a body should be financially, functionally and administratively dominated by or under the control of the government to be regarded it as a State within Article 12. The researcher feels that the domination or control of government is seriously being jeopardized by the increasing emphasis on privatisation and disinvestment. To put it simply, the reason behind government undertook the disinvestment of shares in sick or debt-ridden public enterprises is to find an appropriate buyer who can pay off the past debts as well as financially help in the day-to-day functioning of these enterprises. It is only when government does not have resources to financially aid or suffers from huge deficit that they shift their focus on other alternative resources like privatisation and Foreign Direct Investment (FDI) through disinvestment. Furthermore, inefficient functioning by government nominated members in Board of Directors of these public enterprises is another reason behind disinvestment. Disinvestment can lead to efficient functioning because unlike an employee of a public enterprise who has a fixed salary, any employee of a private firm would be committed to increase the profits as the salary is dependent on the employee’s performance in the firm and this would further increase accountability of the administration. Therefore, the present disinvestment of government shares in public enterprises rules out the possibility of any such enterprises to be financially, functionally or administratively dominated by the government.

If we consider the disinvestment plan of national carrier Air India, would the government be able to dominate financially, functionally or administratively if the recently proposed 76% (more than three-fourth) share in national carrier Air India is successfully sold off to interested private buyers. As per the disinvestment process it would also require the buyers to pay off the already existing debts and financially aid the loss-making national carrier. The researcher would let the readers decide that whether after disinvestment of shares in Air India

it would allow the government to have same dominance or would rather allow the private enterprises to reduce that dominance and ensure they also play an important role in the functioning of Air India so that they don’t again run into losses.

Now, consider an example between a State-owned PSU and a private company engaged in similar business. ONGC (Oil and Natural Gas Corporation) and RPL (Reliance Petroleum Limited) both deals with the production of oil and natural gas product and ultimately sells them with the objective of earning profits. The only difference is that ONGC is owned by government and hence falls under State whereas Reliance Petroleum is owned by a private entity. It cannot be the guiding principle that since it is owned by government it would be for a public purpose and hence it is an agency or instrumentality of State by completely forgoing the manufacturing and selling operations. The purpose and objectives of these public enterprises is to earn profits like other private sector firms. If the objective of PSU was to focus on public welfare and benefits then these PSU would have suffered huge losses and incurred debts till now. Therefore, PSUs (Public Sector Undertaking) like ONGC, Steel Authority of India Limited (SAIL), Indian Oil Corporation (IOC), Bharat Petroleum Corporation Limited (BPCL) does not satisfy the public function test because PSUs are established for generating profits and not for governmental social welfare functions.

HISTORICAL BACKGROUND

The interpretation of the term ‘other authorities’ in Article 12 started late in 1960’s with Rajasthan State Electricity Board v Mohanlal\(^\text{142}\), the Hon’ble Supreme Court ruled that a State electricity board set by a statute would be ‘an authority’ under Article 12. In 1975 the ambit was extended by Supreme Court to include Life Insurance Corporation (LIC), Oil and Natural Gas Commission (ONGC) and the Finance Corporation within the term State in Sukhdev v Bhagatram\(^\text{143}\). Later, in 1979 the Supreme Court of India in R.D. Shetty v. International Airport Authority of India\(^\text{144}\), held that International Airport Authority was an instrumentality or agency of the State though it was constituted as a corporate body under the International Airport Authority Act, 1971. The agency or instrumentality test included government companies defined under Section 617 of Companies Act, 1956\(^\text{145}\) within the meaning of State in Article 12. In Som Prakash v. Union of India\(^\text{146}\), the majority held that Bharat Petroleum Corporation is a government company within ‘other authorities’ in Article

\(^{142}\) AIR 1967 SC 1857.

\(^{143}\) AIR 1975 SC 1331.

\(^{144}\) AIR 1979 SC 1626.

\(^{145}\) S. 617, Companies Act, 1956.

\(^{146}\) AIR 1981 SC 212.
12. Hence, the likes of Bharat Petroleum Corporation (BPCL) and *Indian Oil Corporation*\(^{147}\) was held to be an instrumentality of State

Since 1950, Government of India had adopted a socialist economy by nationalising all core sectors like mining, steel, telecommunications, electricity generation, banking and gave emphasis on public welfare schemes. However, the economy suffered from unequal balance of payments, low annual growth rate, rising inflation, borrowed from external sources to finance the deficits. In order to combat the ongoing economic crisis, the then Union government in 1991 introduced the concept of **Liberalization Privatisation Globalisation (LPG)**. After the implementation of LPG, there had been sale of shares of sick Public-Sector Undertaking (PSU) in favour of private enterprises. It brought an end to State monopoly in key sectors by privatisation.

It is necessary to point out that all the above noted cases that has given a broad interpretation to ‘State’ were decided during the period from 1960 to 1990. From a socialist structure to the introduction of capitalism through LPG policy in 1991 and now Public-Private Partnership, **Justice P Jaganmohan Reddy**, a former judge of the Supreme Court observed that the criteria for deciding whether a public enterprise would fall within Article 12 “…. have varied with different approaches of judges according to their views of social values that came to prevail at the time when decided their cases”\(^{148}\). It is the present social conditions that should be the guiding factor to decide the ambit of Article 12. All the above-mentioned cases in this paper were decided on the basis of the socialist economic system prevailing during that time period and the then government focus on social welfare of the public by nationalising all core sectors of the economy. Now, in the present 21\(^{st}\) century, it is a mixed economy with equal emphasis on socialist as well as capitalist. It is for the same reason that today we have Indian Railways which is fully owned by ‘State’ and capitalist like billionaire Mukesh Ambani who has invested billions of dollars in core sectors like Petroleum and Natural Gas, Textiles, Petrochemicals, Telecommunications, Retail. Therefore, with growing trends of privatisation and Foreign Direct Investment in public enterprises, it is only prudent to consider that whether the divestment of majority of shares or privatisation falls in line with the tests laid

\(^{147}\) Mahabir Auto Stores v. Indian Oil Corporation, (1990) 3 SCC 752.

down by the Hon’ble Supreme Court of India in *Ajay Hasia v. Khalid Mujib*\(^{149}\) case as well as *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*\(^{150}\).

Although it is well established that a public enterprise is an instrumentality of ‘State’ but there have been different opinions from judges in the above-mentioned cases. *Justice R.S. Pathak* had some hesitation in accepting the proposition that Bharat Petroleum Corporation Limited as a ‘State’ within the meaning of Article 12. However, the Hon’ble judge concurred but observed that he would have welcomed a wider debate on the fundamental principles involved in the issue and on the implications flowing from the definition of a government company in the Companies Act 1956\(^{151}\). Again, in the *International Airports Authority case*\(^{152}\), one of the judges observed that:

"By deciding that organisations like the ones under consideration in these cases are 'other authority' and regulations they make is law we would at one stroke be creating a large mass of neo-government servants and Article 14 and 16 would provide ample opportunities for endless litigation’”

**LAW COMMISSION REPORTS**

The *Law Commission of India* under the chairmanship of *Justice K.N. Singh* in its 145th report\(^{153}\), examined the matter of ‘Article 12 and Public-Sector Undertaking’. The Law Commission also examined the points raised by Bureau of Public Enterprises:

1. Firstly, as regards service matters, it is experienced that by reason of application of the provision of Article 14 of the Constitution to Public Sector Corporations, employees of these Corporations have practically come to acquire a permanent employment status and their services cannot be terminated even if the rules allow such termination on three months' notice.

2. Secondly, in the sphere of award of contracts, it has been noticed that even where the management of a Public-Sector Corporation knows of the bad credentials of a firm, it cannot stop dealing with that firm or refuse to deal with that firm, without following the formalities insisted upon in the judicial decisions on the subject. Further, if a person having dealings with a Public-Sector Corporation does not get the required

\(^{149}\) Supra 137.

\(^{150}\) Supra 140.

\(^{151}\) Supra 145.

\(^{152}\) AIR 1979 SC 1626.

material from the corporation, he files a writ petition and often brings an application to seek an ex-parte injunction against the Public-Sector Corporation to deliver the material.

3. Thirdly, instances have come to the notice that the courts have granted interim orders, even for not calling the ordinary meetings of the general body of the corporate bodies.

4. Finally, a point that has been raised regarding a matter of procedure in the context of documents is that if a document issued by another agency in the public sector is produced as evidence in court, it is not possible to dispute the same even if it be incomplete or defective as the other party takes the plea that the same was issued by another agency of the Government and as per the doctrine of "instrumentality", the document is supposed to be accepted by all agencies.

Moreover, the Bureau of Public Enterprises had proposed an amendment to Article 12 so as to exclude Public Sector Undertaking from the expression of 'other authorities' to ensure avoidance of Judicial scrutiny and interference by courts in the functioning of these enterprises or undertaking. The managers of public enterprises feel that they render impossible a managerial style of functioning and handicap public enterprises severely in a competitive world. Academicians and students of management tend to share this concern to some extent.

It is to be noted that the Eleventh Law Commission under the Chairmanship of Justice A.D. Desai in its 126th Report\textsuperscript{154}, examined the reasons for the spurt in litigation in which Public Sector Undertakings are involved and also stressed the need for evolution of a sound litigation policy. The Report recommended the establishment of an effective Grievance Cell for the settlement of disputes between the employer and the employees in the Public Sector. It further recommended that disputes relating to commercial and business transactions should also be settled through the medium of arbitration and other alternative dispute resolution methods.

As recommended by the Eleventh Law Commission that Arbitration and Conciliation between Public Sector Undertakings and employees of public enterprises or one who is in a contractual relationship with public enterprises should be the medium of settlement rather than burdening the Indian Judiciary with more litigations. A Grievance Cell should

adjudicate matters of employer-employee conflict as followed in private sector companies. This would also save time and cost of the employee and the public undertaking. Arbitration helps in quick disposal of cases as compared to litigation in courts which take years to decide the dispute. Therefore, it is important for the government to review and implement these recommendations for the best interest of the society and reduce the burden of litigation in courts.

**OBJECTIVE & PURPOSE OF PUBLIC SECTOR ENTERPRISES**

Public Sector Enterprises are corporate bodies set up by the government for business purposes and not for social or public purposes. Firstly, it is a fact that hardly any public enterprise exercises 'State like power'. These enterprises are mostly engaged in the production of goods or services and have no special power over the general public. It is only specific regulatory agencies like Food Corporation of India (FCI) which performs governmental functions and exercises ‘State’ like power. Secondly, assuming every PSUs is an agency or instrumentality of the ‘State’, it cannot be a conclusive criterion to regard it as a State. There lies a difference between principal and agent and we cannot regard an agent in the same manner or as a part of the principal. An agency which performs a similar function like that of principal cannot be said to be principal. Therefore, PSUs are PSUs and State is State and both are independent to each other. Thirdly, even a private sector enterprise can be regarded a part of State under the existing meaning of ‘other authorities’. In order to justify that a private enterprise performs the same functions like other public enterprises let us consider the example of SAIL (Steel Authority of India Limited) and JSW (Jindal Steel Works) both deals with the manufacture and production of steel and ultimately sells them with the objective of earning profits. The only difference is that SAIL is owned by government and hence falls comes under State whereas JSW is owned by a private entity. It cannot be the guiding principle that since it is owned by government it would be for a public purpose and hence it is an agency or instrumentality of State by completely forgoing the manufacturing and selling operations. The purpose and objectives of these public enterprises is to earn profits like other private sector firms and not for public purposes. This position has been reiterated by Supreme Court in the case of *Oil and Natural Gas Commission v. The Association of Natural Gas Consuming Industries of Gujarat*\(^{155}\), held that the notion of cost-plus basis can be the only criterion for fixation of prices in the case of public enterprises stems basically from a concept that such enterprises should function either on a no profit no

\(^{155}\) (1993) 1 SCALE 900.
loss basis or on a minimum profit basis. This is not a correct approach but given a favourable area of operation, commercial profits should neither be an anathema nor a forbidden fruit even to public sector enterprises. Therefore, a careful scrutiny is required to consider whether SAIL, ONGC, BHEL, IOC owned by the government really serves for the best interest of the society or functions for earning profits.

The Industrial Policy Resolution of 1956 stated for the adoption of the socialistic pattern of society as a national objective and to enhance the role of public sector in the process of growth and development on socialistic pattern of society. In furtherance of this Industrial Policy, a number of public sector undertakings were constituted. However, the concept of welfare state is not only restricted to socialist but includes capitalist as well as mixed economy on various grounds. In some cases, government would focus on social security schemes and national health services whereas in others the state could be directly engaged in the production of goods or services and could be the employer of large numbers of people for welfare of society. It is not that only Socialist state performs welfare functions but that scope is wider and includes Capitalist state which in spite of focusing on private control under corporates and businessman whose primary purpose is to earn profits also undertakes the responsibility to provide services in the interest of the society and thus performs welfare functions. Presently, India is striving towards a mixed economy where the PPP model is taking shape to achieve a welfare state. Additionally, the Industrial Policy Resolution of 1956 declared the intention of government to grant managerial autonomy and operational freedom to public enterprises. Even the Parliamentary Committee on Public Undertaking (COPU) has stressed the importance of managerial autonomy on more than one occasion.

Therefore, the purpose of ensuring managerial freedom, business like functioning and by distancing these enterprises from the government, these public enterprises are set up as corporate business entities. Also, the concept of welfare functions is only performed by PSUs does not hold ground because welfare functions are performed by both private as well as public enterprises maybe the public function discharged by public enterprises are comparatively more than that of private enterprises. In the 21st Century, Indian economy is a mixed economy where both public and private sector enterprises equally focus on welfare functions for the society as well as maximizing profits for a balanced growth.

**CRITERIA FOR DECIDING PUBLIC SECTOR ENTERPRISES**

There is no recognizable principle to distinguish between public enterprises established under specific statutes and those established as companies under the Companies Act, 1956. Life
Insurance Corporation (LIC) was established under the Life Insurance of India Act, 1956 whereas General Insurance Corporation of India was incorporated on 22nd November, 1972 under the Companies Act, 1956 but both are ‘State’ for the purpose of Article 12. The Oil and Natural Gas Commission and Coal India are two public enterprises which deals with basic natural resources namely hydrocarbons and coal respectively but ONGC was set up under ONGC Act, 1959 while Coal India was a company registered under the Companies Act, 1956 which later was nationalized as a public sector company in 1975. Similarly, Air India is a corporation established under the Air Corporations Act, 1953 but the Shipping Corporation of India is a company by virtue of Shipping Corporation of Amalgamation Order, 1961 whereby Western Shipping Corporation Limited was merged into the Eastern Shipping Corporation Limited although both performs similar public functions. In these circumstances, the distinction of form between statutory undertakings and companies seems to have no bearing on the question of whether all or some public enterprises should be regarded as 'state' under Article 12 of the Constitution. Therefore, it requires a fixed criteria or principle to distinguish public enterprises from government owned companies otherwise the scope of ‘other authorities’ would extend indefinitely without any precise boundary. Moreover, the importance of statutory acts would lose its significance if a government owned company registered under Companies Act, 1956 is regarded as ‘State’.

Further, ownership of a company by the government does not itself satisfies that it is a ‘State’ under Article 12 of Constitution of India. The researcher is of the opinion that if ownership is the sole and determining factor then by this test alone, we can conclude that certain corporate bodies continue to be ‘State’, then the act of decentralization of the management of PSUs as focussed during the Industrial Policy Resolution of 1956 and the conferment of managerial autonomy would become pointless. Since, the nature of activity demands an organisation patterned on private business, the setting of a corporate body is not only appropriate but it is an important distancing step from the rigours of governmental act and it seems strange to destroy that distance by saying that such organisations continue to be 'state'. A metaphor that is often used is piercing a veil and recognising the reality behind it. Under Company Law, the 'corporate veil' of private sector companies may in some cases need to be pierced for certain purposes but in so far as public enterprises are concerned, it is quite clear that SAIL, BHEL and IOC are companies owned by the government and no piercing of any veil is needed for recognising this. The corporate veil in such cases is not an illusion but a reality which needs to be taken note of and not brushed aside as irrelevant simply because it is owned by
government. It is only in those cases in which corporate functions are performed by public enterprises that the metaphor of piercing the veil acquires some significance.

**DEEP AND PERVERSIVE CONTROL**

It is pertinent to understand that deep and pervasive control of the government exist not only in public enterprises but also in private sector. In a system of centralised, comprehensive economic planning and extensive state intervention in the economy there is considerable government control over the functioning of not only the public enterprise but also the private sector. Under a wide range of regulatory and developmental legislation and systems of clearances and approvals, private sector and companies are subject to government control and approval in regard to such matters as location, plant capacity, product-mix, the issue of equity capital to the public, the release of foreign exchange, the import of capital goods, components, raw-materials and intermediates, the pricing and distribution of the product. In addition to it, private sector entrepreneurs’ approach public financial institutions like banks for the underwriting of equity and for long term loans and the financial institutions in turn needs to abide by the guidelines given by the government while extending loans to private entrepreneurs or companies. So not only public sector but also private sector falls within the control of government. Therefore, these public-sector undertakings are only owned by government and there exist only normal control over the functioning of the business like in case of any other private sector.

It is indeed true that public enterprises are wholly or mostly owned by the government and that the Boards of Directors are appointed by the government and also the government reserves the right to issue directives to public enterprises on any matter as and when it is considered necessary. However, it does not imply ‘deep and pervasive control’ because as an owner, the government has certain rights and responsibilities over the public enterprises and so it is inherently necessary for the government to discharge its functions. Therefore, equating ‘ownership’ with ‘deep and pervasive control’ is clearly an exaggeration of the ownership powers of the ‘State’ over public enterprises. As said earlier there exist only normal ownership control over PSUs unlike in case of Reserve Bank of India (RBI) could be described as a public enterprise in so far as it performs banking operations, manages funds and produces profits but also formulates and manages monetary policies, manages exchange control, controls the entire banking system, lays down the credit policy and monitors the money supply in the economy. In these aspects, its functions are like those of the ‘State’ and therefore RBI is a ‘State’. However, as regards to industrial and commercial public
enterprises in general are concerned, the nature of their activity relating to business purposes cannot readily lead to the general conclusion that they are 'State'.

Moreover, Industrial Policy Resolution, 1956 declared that intention of the government was to grant managerial autonomy and operational freedom to public enterprises. If despite this there exist excessive governmental control over the public enterprises which was not an intended or desirable feature but an aberration or dysfunction and hence one of the most intractable problems in the relationship between the government and public enterprises. It is important to change this system and not to accept the dysfunctional control. It is argued that public enterprises are not 'State' but are corporate business entities draws the conclusion that dysfunctional control should be removed. As things stand, governmental control leads to the conclusion that public enterprises are 'State' and this in turn would encourages the bureaucratic and political system to tighten its control further thus handicapping the business functioning of the undertakings.

IMPACT ON MANAGEMENT
With the wide interpretation of Article 12 it would impact the management and functioning of the business of the enterprise. Firstly, the characterisation of public enterprises as "State" is essentially in relation to fundamental rights and the provisions for writs. It is mainly the employees of public enterprises and others who are in a contractual or potentially contractual relationship with public enterprises. An aggrieved employee of a private sector company can go to court on the basis of his contract of appointment. Similarly, an aggrieved contractor of a private sector firm can approach the court on the basis of the terms of his contract or a bidder for pre-qualification for tendering for a major contract can go to court if the conditions laid down in the notice inviting bids for pre-qualification have not been adhered to. Only an aggrieved employee or tenderer or supplier in the case of public enterprise can file a writ petition. This is the precise implication regarding public enterprises as 'State' and leads to a crucial differentiation between public enterprises and private sector.

Secondly, during managerial functions the selection of good personnel and their advancement or non-advancement on the basis of merit are among the most crucial elements. Similarly, the selection of good agents or suppliers or consultants or contractors is crucial to the success of a business. In Government, all these become acts of State patronage and consequently issues of fairness, non-discrimination, natural justice and so on become far more important than suitability and efficiency. Moreover, a managerial act such as the framing of job specifications becomes virtually a legislative act of government and all
recruitment rules are considered to be acts of subordinate legislation. Government employees can go to court on matters such as being called for interviews for appointments, the actual selection for appointment or promotion, seniority, the determination of pay, disciplinary matters. The excessive protection given to Government servants and the extensive legal recourse to them are among the major factors affecting the efficiency of Governmental functioning. Whatever might be the merits of such protection in the case of Government employees, the consequences of the ruling that public enterprises are ‘State’ is that this entire approach and attitude gets extended to them. In this case, the framing of job specifications and recruitment rules by the managerial body of the PSUs would virtually become acts of subordinate legislation and questions of fairness and discrimination tend to over shadow considerations of merit and efficiency. Questions of uniformity and non-discrimination also loom large in the context of contracts and purchases. The managements of public enterprises are thus obliged to worry more about procedural correctness and defensibility in a court of law than about making the most expeditious, efficient and economic choice. This weakens the managements of public enterprises and renders commercial and enterprises like behaviour extraordinarily difficult. In effect, this alters their nature as business ventures and handicaps them in the practice of management.

For instance, a PSU advertises for the post of a manager. A total of 200 applications was received by the public enterprise. The management decides to eliminate some of those applications on the basis of educational qualifications, length of experience, age, communication skills and other factors. In spite of scrapping of applications there still remains around 10 candidates who are equally qualified to secure the job. A careful scrutiny of bio data can solve the matter. It is also important that the selection committee must give reason or puts it in writing for every scrapping of application otherwise the possibility of any candidate approaching the court against the PSU for arbitrary action under Article 14 cannot be ruled out. Moreover, after short listing the selection committee makes careful assessment of the personality traits as revealed in the interview yet the possibility of a rejected candidate going to court with allegations of prejudice, favouritism, misjudgement, error, political pressure cannot be ruled out. There would be a fear among the management that every time they select someone based on judgement and skill the rejected candidate would approach the court alleging favouritism, arbitrariness. It is not that every writ against public enterprises is successful but every act of management is open to litigation. Hence, it

156 Art. 14, the Constitution of India.
affects the efficient working of the enterprise, wastage of time due to judicial intervention and ultimately affects the business of these undertakings.

Consequently, it must be noted that no great public purpose is served by this approach of functioning. Only a section of society receives benefit from it in the form of employees, tenderers and contractors but not the general public. If a public sector undertaking renders poor service to the consumers, the latter cannot invoke the provisions for writs or claim fundamental rights. The only remedy for poor service is the introduction of competition or the establishment of some special machinery for protecting the consumer’s interest like that of Consumer Disputes Redressal Forum.

Therefore, Article 12 should exclude Public Sector Undertakings because these enterprises function on business and commercial lines and are to be allowed the largest measure of freedom. To highlight the above argument, Rule 312(A) of Rules of Procedure and Conduct of business in Lok Sabha reads as follows:

312(A) There shall be a Committee on Public Undertakings for the examination of the working of the public undertakings specified in the Fourth Schedule. The functions of the Committee shall be:

(c) to examine in the context of the autonomy and efficiency of the public undertakings, whether the affairs of the public undertakings are being managed in according with sound business principles and prudent commercial practices.

Similarly, Industrial Policy Resolution of 1955 states that:

“With the growing participation of the State in industry and trade, the manner in which these activities should be conducted and managed assumes considerable importance. Speedy decisions and a willingness to assume responsibility are essential if these enterprises are to succeed. For this, wherever possible, there should be decentralisation of authority and their management should be along business lines.... Public enterprises have to be judged by their total results and in their working, they should have the largest possible measure of freedom”

FUNDAMENTAL RIGHTS AND EFFICIENCY OF MANAGEMENT

Efficiency and competitive business of the Public-Sector Undertakings are not absolute virtues and that public enterprises should accept restrictions on their modes of functioning in the interest of protecting fundamental rights even if this blunts the edge of their efficiency to some extent. Fundamental rights are inherent rights and any violation of it would require
judicial intervention. The courts are only trying to protect fundamental rights and prevent arbitrary action and is not in any way interfering with corporate form or business-like functioning. Non-compliance with the procedure laid down in law, want of sufficient factual material, acting mala fide or on collateral considerations and unreasonableness are some of the important grounds for such judicial review. However, it is the government not the courts that decides the priorities of public enterprises and hence, it is for the government and not for the judiciary to decide whether efficiency and profitability should be given less importance. Moreover, the conflict between fundamental rights and efficiency arises only because the courts has decided that public enterprises are 'state'. The Supreme Court has been enlarging the scope of Article 12 to such an extent that the very concept of 'State' is becoming somewhat blurred and vague. In *M.C. Mehta v. the Union of India*157, the Supreme Court came close to adjudge even a private sector company (Shriram Fertilisers) to be 'State' though in the end it refrained from pronouncing on this question. It is alarming that if corporate public enterprises, registered societies as well as private sector companies comes under Article 12 then the question lies to what extent the scope of Article 12 can be expanded.

Even if the Supreme Court argue that it is protecting the fundamental rights of the aggrieved and for this purpose declares a particular organisation to be 'state', it is arguing not from cause to effect but from effect to cause. If the Supreme Court were to apply certain tests and come to a certain conclusion, it would be interpreting the Constitution; and then the question of fundamental rights may arise as a consequence. However, if it first decides that it wants to advance the cause of fundamental rights and then with this purpose in view it declares public enterprises to be 'State', it is reversing that order and legislating to give effect to certain socio-economic objectives enshrined in DPSP (Directive Principles of State Policy) which is the prerogative of Parliament.

**CONCLUSION**

In a nutshell, the bureaucratic and governmental control over the functioning of public enterprises would result in public enterprises acting as subordinate body of Parliament. This would severely handicap the functioning of the enterprises. It would weaken the management of public enterprises, would affect the motivation of the employees from taking bold decisions for the benefit of enterprises. This clearly represents the most serious threat to the continuance of the public enterprises. The researcher intention is not to question the judicial decisions of the highest court in the land but merely to put forward a reasoned case for a

reconsideration of the matter in view of the changing times that our economy has gone through. As a result, the control and functioning of public enterprises has also quite significantly shifted in the hands of private firms under the privatisation policy of the government. It is no doubt that fundamental rights are inherent rights and to protect it the Hon’ble Supreme Court should hold liable both public as well as private if it affects the right of citizens as happened in the case of *Shriram Fertilizers*¹⁵⁸ and *Union Carbide*¹⁵⁹. Therefore, it is not necessary that an enterprise has to be a ‘State’ under Article 12 so as to approach the Court under Article 32¹⁶⁰ or Article 226¹⁶¹. It is possible even if it is a private sector company. Fundamental Rights can be invoked against any anyone and the concern for fundamental rights and welfare and the expansion of the related jurisprudence does not necessarily seem to require the expansion of the scope of Article 12.

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¹⁵⁸ Ibid.
¹⁶⁰ Art. 32, the Constitution of India.
¹⁶¹ Art. 226, the Constitution of India.
Thanking Note

The Editorial Board, Student Coordinators and the Advisory Members of the Indian Constitutional Law Review seek to express their gratitude to all members and contributors who have made immensely valuable contributions to the growth and evolution of the Constitutional law landscape of India. We express our heartfelt gratitude to all Advisory Members who have provided their valuable insights in the framing of this edition. The Student Editors have also played a crucial role in the development and outcome of this publication.

Amit Singhal
Editor-in-Chief

On behalf of the esteemed members of the Editorial Board, Honourable Members of the Advisory Council & the members of the Publishing Unit