



**LAW COMMISSION OF INDIA**

**ONE HUNDRED FORTY-FIFTH  
REPORT  
ON  
ARTICLE 12 OF THE CONSTITUTION  
AND  
PUBLIC SECTOR UNDERTAKINGS**

**1992**

**K.N. SINGH**  
*(Former Chief Justice of India)*



*Chairman*  
Law Commission  
Government of India  
Shashtri Bhawan  
New Delhi-110001  
*Tel. Off. : 384475,*  
*Res. : 3019465*  
*November 25, 1992*

D.O. No. 6(a)(1)/87-LC(LS)

Dear Prime Minister,

I have great pleasure in forwarding herewith the 145th Report of the Law Commission of India on the subject "ARTICLE 12 OF THE CONSTITUTION AND PUBLIC SECTOR UNDERTAKINGS".

2. This is the second Report after the constitution of XIIIth Law Commission. This Report is being submitted in pursuance to the formal reference made by the Minister for Law & Justice vide his D.O. No. F. 12(1)/87-IC, dated 30th March, 1987 to the XIth Law Commission headed by Justice D.A. Desai. A photo copy of the letter is enclosed. By that letter the Law Commission was requested to examine the question whether Public Sector Undertakings should be excluded from the operation of Article 12 of the Constitution.

3. The Commission has examined the question in its various aspects in the light of the law declared by the Supreme Court and also in the background of 126th Report of the Commission which dealt with litigation policy of Government and Public Sector Undertakings. The Report further deals with the questions raised by the Bureau of Public Enterprises at whose instance the reference had been made to the Commission.

With kind regards, .

Yours sincerely,  
(K.N. Singh)

Hon'ble Shri P.V. Narasimha Rao,  
*Prime Minister and*  
*Minister for Law, Justice & Company Affairs,*  
*New Delhi.*



सत्यमेव जयते

D.O. No. F.12(1)/87-J.C.

*Minister of State*  
Law and Justice  
Government of India  
New Delhi-110001  
30 March, 1987

Dear Shri Desai,

As you are aware, the Supreme Court has of late interpreted Article 12 of the Constitution holding that any agency or instrumentality of the Government will be covered by the expression "other authorities" occurring in that Article. The latest judgement of the Supreme Court is that of *Central Inland Water Transport Corporation Limited Vs. Brojo Nath*, reported in AIR 1986 SC 1571.

2. The matter was considered in a meeting of Committee of Secretaries on 19-1-1987, when it was decided that a formal reference to the Law Commission should now be immediately made for which purpose the Department of Public Enterprises would draw the necessary reference stating all the issues involved and send it to the law Ministry for making a reference to the Law Commission. The Law Commission would be requested to treat this on an urgent basis and give their recommendations as early as possible.

3. Accordingly, the Bureau of Public Enterprises have sent to us the material for reference to the Law Commission and the same is enclosed.

4. I shall be grateful if the Law Commission could examine the issues raised by the Bureau of Public Enterprises and favour us with their recommendations on the subject as early as possible.

With kind regards,

Yours sincerely,  
(H.R. Bhardwaj)

*Shri Justice D.A. Desai,*  
*Chairman, Law Commission,*  
*Shastri Bhawan, New Delhi.*

*Encl. : As above :*

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## CHAPTER 1

### INTRODUCTION

#### 1.1 Genesis of the Report

This report deals with the question whether public sector undertakings should be excluded from the operation of Article 12 of the Constitution. Article 12 defines the expression "State" as including, for the purposes of Part III of the Constitution (fundamental rights), all local or other authorities within the territory of India or under the control of the Government of India. The Law Commission of India has been requested to examine the question, in a formal reference made to the Commission by the Government of India at the instance of the Bureau of Public Enterprises.<sup>1</sup>

#### 1.2 Decisions of the Supreme Court

The Supreme Court of India has held in a number of decisions that Public Corporations and Undertakings fall within the inclusive definition of 'State'. Therefore these Corporations and Undertakings are subject to Part-III of the Constitution. Consequently, the Supreme Court and the High Courts have power of judicial review under Articles 32 and 226 of the Constitution. The Supreme Court and High Courts have interfered with the orders of Public Corporations and Undertakings in relation to service matters and also with regard to commercial transactions. The interference by the courts caused anxiety to the Bureau of Public enterprises, as, in its opinion, this has created serious difficulties in the functioning of Public Sector Undertakings on commercial and industrial principles. The Bureau has proposed amendment of Article 12 in a manner designed to exclude Public Corporations and Undertakings from the expression "other authorities", to ensure the avoidance of judicial review and interference by courts in the functioning of these Undertakings.

#### 1.3 Points raised by Bureau of Public Enterprises

The Bureau of Public Enterprises has projected the following few difficulties and problems, confronted by the public enterprises which have led them to this reference :—

First, 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.

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 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.

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.

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 in 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.

#### 1.4. Earlier Report

It may be mentioned that in 1988, the Law Commission of India forwarded to the Government a Report concerned with litigation policies and strategies pertaining to (i) the Government, and (ii) public sector undertakings.<sup>2</sup> In that Report, the commission examined the reasons for the spurt in litigation in which Public Sector Undertakings are involved and it also stressed the need for evolution of a sound litigation policy. The Report recommended, *inter alia*, 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

<sup>1</sup> F. No. D.O. F. 12(1)/87-IC dated 30-3-1987 of Shri H.R. Bhardwaj, Minister of State, Law and Justice, Govt. of India.

<sup>2</sup> Law Commission of India, Govt. and Public Sector Undertakings Litigation Policy and Strategies (126th Report).

settled through the medium of arbitration. The present Report deals with a different matter, namely, the substantive question relating to the constitutional status of Public Sector Undertakings. The present Report is not confined to procedural aspects, but deals with the basic question whether the rights and remedies available to a person against the Government by virtue of Part-III of the Constitution should continue to be available against Public Sector Undertakings also, and further, whether it is desirable and constitutionally permissible to amend Article 12, so as to exclude the Public Sector Undertakings from the judicial review of the Supreme Court and the High Courts under Article 32 and 226 of the Constitution. Thus, the scope of the present Report is different from that of the earlier 126th Report. However, some data examined in that Report are relevant and valid for dealing with the question under consideration in the present Report also; and reference thereto would be made at the appropriate stage.

### 1.5 Steps preparatory to the Report

On receipt of the reference from the Government, the Law Commission took steps to obtain statistical data through the Bureau of Public Enterprises regarding the nature and quantum of litigation involving the Public Sector Undertakings, in so far as such litigation arises out of the present position under which, by reason of judicial pronouncements, such undertakings fall within the definition of "State". A study of the relevant judicial pronouncements was also undertaken in the Commission. The subsequent Chapters of this Report will cover *inter alia*, the important points arising out of the statistical data that the Commission has been able to obtain<sup>3</sup> and also the above-mentioned judicial pronouncements.<sup>4</sup>

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\* Paragraph 3.4, *infra*.

\* Chapter 2, *infra*.

## CHAPTER 2

### PRESENT POSITION

#### 2.1 The constitutional provision

The problem that is going to be dealt with in this Report arises from Article 12 of the Constitution, (occurring in Part III of the Constitution) which reads as under :

“12. In this Part unless the context otherwise requires, ‘the State’ includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

It will be noticed that Article 12 does not, in so many words, provide that undertakings in the public sector fall within the definition of “State”; but that is virtually the position resulting from judicial pronouncements on the subject. To state the position in brief terms at this stage, such undertakings fall within the words “other authorities within the territory of India or under the control of the Government of India.”

#### 2.2 The beginning

Generally, this expansive interpretation of Article 12 is taken to have begun with a judgement holding that the Rajasthan State Electricity Board falls within “State”.<sup>1</sup> In coming to this conclusion, the Supreme Court emphasised the fact that such authorities are constitutional or statutory authorities and that they exercise powers conferred by law. It may be mentioned that State Electricity Boards are constituted under the Electricity (Supply) Act, 1948. The ingredient of “authority” (apart from other additional factors) seemed to have weighed with the court in coming to this conclusion. This reasoning was reiterated in one of the judgements of the Supreme Court pronounced in 1975.<sup>2</sup>

#### 2.3 Agency or instrumentality of the State

In order to analyse the link between the State and the undertaking in question, it was necessary to evolve some formula; and that is the principal approach adopted by the Supreme Court in its well known judgment relating to the International Airports Authority.<sup>3</sup> The International Airports Authority is a body corporate constituted under the International Airports Authority Act, 1971. The Director of the Authority had issued a notice, inviting tenders for putting up and running a second class restaurant and two snack bars at the International Airport at Bombay. Tenders were received in response to the notice. Shri R.D. Shetty, the appellant, who was not a tenderer, filed a writ petition which was rejected by the Bombay High Court. He applied for and obtained special leave to Appeal to the Supreme Court. He urged that the notice inviting tenders by the Airports Authority had stipulated a condition of eligibility, but subsequently the same was changed without any rational justification, as a result of which he could not submit his tender. It was further urged before the Supreme court that the International Airport Authority, being a “State” within the meaning of Article 12 of the Constitution, was bound to give effect to the condition of eligibility set up by it and not entitled to depart from it at its own sweet will without rational justification.

The Airports Authority contended that since the appellant had not submitted any tender, he had no *locus standi* to maintain the petition and he had suffered no injury by the grant of licence to one of the respondents. It further raised the contention that the condition of eligibility had no statutory force. Therefore, even if there was any departure from the standard or norm of eligibility, it was not justiciable. The Supreme Court dismissed the appeal on the ground that the appellant had not submitted any tender and he had suffered no injury. Nevertheless, the Supreme court held that “where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act, arbitrarily at its sweet will, and, like a private individual deal with any person it pleases, but its action must be in conformity with a standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government

<sup>1</sup> *Rajasthan State Electricity Board, Jaipur v. Mohan Lal*, A.I.R. 1967 S.C. 1857.

<sup>2</sup> *Sukhdev Singh v. Bhagat Ram*, A.I.R. 1975 S.C. 1331.

<sup>3</sup> *R.D. Shetty v. International Airport Authority of India*, A.I.R. 1979 S.C. 1626.

that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory." After making the aforesaid observation, the Supreme Court further held that Corporations established by statute or incorporated under law are an instrumentality or agency of the Government, if they satisfied certain tests which may be summed up as under :

- (i) The source of the share capital;
- (ii) The extent of State control over the Corporation, and whether it is "deep and pervasive";
- (iii) Whether the Corporation has a monopoly status;
- (iv) Whether the functions of the Corporation are of public importance and closely related to governmental functions; and
- (v) Whether, what belonged to a Government Department formerly was transferred to the Corporation.

After laying down the aforesaid tests, the Supreme Court observed that the list is not exhaustive and by its very nature, it cannot be, because, with increasing assumption of new tasks, growing complexities of management and administration and the necessity of continuing adjustment in relations between the Corporation and Government, calling for flexibility, adaptability and innovative skills, it is not possible to make an exhaustive enumeration of the tests which would invariably and in all cases provide an unfailing answer to the question whether a Corporation is a governmental instrumentality or agency. The court observed that no one single factor will yield a satisfactory answer to the question and the court will have to consider the cumulative effect of these factors, in arriving at its decision on the basis of facts and circumstances of each case. The court emphasised that since the Corporation is an instrumentality or agency of Government, it would be subject to the same constitutional or public law limitation as the Government. Referring to the principle of equality before law under Article 14 of the Constitution, the court declared that the rule inhibiting arbitrary action by Government must apply equally where such Corporation is dealing with the public, whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into a relationship with any person it likes at its sweet will. Its action must be in conformity with some principle which meets the test of reason and relevance.

#### 2.4 Public Character

For our purpose, it is relevant to point out that the public character of the undertaking is one of the ingredients emphasised by the court in coming to a positive conclusion. The test of "agency or instrumentality" had, in fact, been suggested by Mr. Justice Mathew in 1975.<sup>4</sup> Incidentally, Mr. Justice Mathew had also stressed the element of public character of the functions of the corporation, apart from other factors.

#### 2.5 Government companies

One consequence of the broader test of "agency or instrumentality" that came to be laid down (as stated above) was that Government companies, as defined in section 617 of the Companies Act 1956 came to be included within the concept of "State", for the purposes of Article 12 of the Constitution. Thus, the Bharat Petroleum Corporation was held to fall within its ambit.<sup>5</sup> Comparatively recently, the Indian Oil Corporation has also been held to fall within the ambit of Article 12.<sup>6</sup> Accordingly, the sudden stoppage of supply of lubricants to the petitioner firm by the Indian Oil Corporation, without notice, was held to be violative of Article 14 of the Constitution as arbitrary, against natural justice and fair play and unreasonable and practically amounting to blacklisting of the petitioner firm. It may be mentioned that Government companies are not created directly by statute, but (like other companies) are incorporated under statute. Nevertheless, the test of "agency or instrumentality" became relevant for coming to this positive conclusion.

#### 2.6 Statutory and non-statutory status

After the above decision, to state the position broadly, it became possible for the courts to hold an entity to be "State", even if it did not have a direct statutory origin. No doubt, if it is a statutory undertaking vested with functions analogous to those of the Government, it would be falling within the ambit of State. But the absence of direct statutory origin may not be material, if the entity in question is an agency or instrumentality of the State. This is illustrated by the well known judgment of 1981.<sup>7</sup>

<sup>4</sup> *Sukhdev Singh v. Bhagat Ram*, A.I.R. 1975 S.C. 1331.

<sup>5</sup> *Som Prakash Rekhi v. Union of India*, A.I.R. 1981 S.C. 212 : (1981) 1 S.C.C. 499.

<sup>6</sup> *Mahabir Auto Stores v. Indian Oil Corporation*, (1990) 3 S.C.C. 752.

<sup>7</sup> *Ajay Hasia v. Khalid Mujib*, A.I.R. 1981 S.C. 487.



That case involved a society registered under the Jammu and Kashmir Registration of Societies Act, running the Regional Engineering College at Srinagar, sponsored by the Government of India. The ingredients which weighed with the Supreme Court in holding the society to be a "State"—to mention the principal characteristics—were the following :—

- (i) The composition of the society is dominated by the representatives of the Government.
- (ii) The expenses of the society are entirely provided by the Central Government.
- (iii) The rules made by the society require prior approval of the Government.
- (iv) The society is required to comply with all directions of the Government.
- (v) Government can appoint and remove members from the society.
- (vi) Thus, an overall control is exercised by the Government.

## 2.7 Registered Societies

It may be of interest to mention that in several other judicial decisions, registered societies which are practically under the control of the Government have been held to fall within "State". Some examples are given below :—

- (i) Indian Statistical Institute;<sup>8</sup>
- (ii) Indian Council of Agricultural Research;<sup>9</sup>
- (iii) Buddhist School;<sup>10</sup>
- (iv) Children's Aid Society;<sup>11</sup>

## 2.8 Deep and pervasive control and societies

In contrast, where the court found, on the facts, that the society was not related to governmental business and was not subject to deep and pervasive control of Government, it would not fall within "State". This is illustrated by the judgement relating to the institute of Constitutional and Parliamentary studies.<sup>12</sup>

## 2.9 Banking institutions and co-operative societies : Test of Control

It is on an application of the test of "control", that nationalised banks have been held to fall within "State" by the Supreme Court.<sup>13</sup> In contrast, co-operative banks and other co-operative societies have been held by most High Courts not to fall within "State".<sup>14-15-16-17</sup>

## 2.10 Tests not exhaustive

It could be pointed out at this stage, that none of the tests which have come up for consideration in the decisions of the Supreme Court mentioned above is conclusive in itself, nor is the enumeration exhaustive.<sup>18</sup> The financial contribution of the Government, its deep and pervasive control, the nature of the functions performed by the corporation, the monopolistic status of the corporation and other relevant factors, may make a difference. Sometimes, one or other factor may come to be emphasised but essentially, it is the totality of the circumstances which would be taken into account. The fact that the share contribution of the Government is not very dominant may, along with other factors, become material, as happened in the case of —

- (i) The Cochin Refineries Limited;<sup>19</sup>
- (ii) Nellore Co-operative Spinning Mills Limited;<sup>20</sup>
- (iii) The joint venture of Maruti Udyog Limited.<sup>21</sup>

<sup>8</sup> *B.S. Minhas v. Indian Statistical Institute*, (1983) 4 S.C.C. 582.

<sup>9</sup> *P.K. Ramachandra Iyer v. Union of India*, (1984) 2 S.C.C. 141.

<sup>10</sup> *Chairman, School of Buddhist Philosophy v. Makhmal Mattoo*, (1990) 4 S.C.C. 6.

<sup>11</sup> *Sheela Barse v. Secretary, Children's Aid Society*, (1987) 3 S.C.C. 50.

<sup>12</sup> *Tek Raj Vasandhi v. Union of India*, (1988) 1 S.C.C. 236.

<sup>13</sup> *Hyderabad Commercials v. Indian Bank*, (1991) 2 SCALE 825.

<sup>14</sup> *Chakradhar v. Sama Singhu Service Co-operative Society*, A.I.R. 1982 Orissa 38.

<sup>15</sup> *Pritam Singh v. State of Punjab*, A.I.R. 1982 P&H 228.

<sup>16</sup> *Satish Kumar v. Punjab State Co-operative Bank*, A.I.R. 1981 P&H 382.

<sup>17</sup> *Sri Konaseema Co-operative Central Bank Ltd. v. N. Seetharama Raju*, A.I.R. 1990 A.P. 171.

<sup>18</sup> *Chander Mohan v. N.C.E.R.T.*, (1991) 3 S.C.J. 613.

<sup>19</sup> *K.M. Thomas v. Cochin Refineries Ltd.*, A.I.R. 1982 Ker. 248.

<sup>20</sup> *Baroda Cotton Co. v. Andhra Pradesh State Federation of Co-operative Spinning Mills Ltd.*, A.I.R. 1991 A.P. 320.

<sup>21</sup> *P.B. Ghayalod v. Maruti Udyog Ltd.*, C.W. No. 3182/90 Delhi High Court, decided on 11-9-1991.

At times, courts have tried to explain that the mere provision for guidance, advice and counsel by the Government does not necessarily amount to deep and pervasive State control. This is illustrated by decisions relating to—

- (iv) Rashtriya Lalit Kala Kendra (National Academy of Arts);<sup>22</sup>
- (v) Indian Institute of Bankers.<sup>23</sup>

## 2.11 Non-Statutory functions

If a non-statutory body does not perform any statutory or public duty, it may not fall within "State".<sup>24</sup> Similarly, the mere fact that the name of particular society appears in the Allocation of Business Rules would not be conclusive, as has been held in a case relating to the Council of Scientific and Industrial Research, which is a registered society and non-statutory body.<sup>25</sup>

## 2.12 Legal Position

Now the legal position is clearly established by the decision of the Supreme Court that a Corporation, a Government Company or any other instrumentality of the State or agency constituted under the statutory provision or under the Companies Act or under the Societies Registration Act would fall within the definition of 'State' under Article 12 of the Constitution for the purposes of Part III of the Constitution, provided such undertakings fulfil the tests as discussed earlier. Sometimes, difficulties do arise in determining the character of an instrumentality of the State—even on the application of the tests laid down by the Supreme Court. Some of the High Courts have taken divergent views in this regard. But if one bears in mind the fact that no particular factor is conclusive, one can understand the decisions which are sometimes cited as deviating from the principles laid down by the Supreme Court. It has to be remembered that if a company, besides being a non-statutory body, does not perform any statutory or public duty, it may not fall within "State". Similarly, the mere fact that the name of a particular society appears in the Allocation of Business Rules would not be conclusive, as held in the case of *Council of Scientific and Industrial Research*, a registered society and non-statutory body. [The view taken by the Supreme Court in that case has been watered down by subsequent decisions; and, at present, the view taken in the case of *International Airport Authority* holds the field.] In *Ajay Hasia's case*, the Supreme Court held that society registered under the Jammu and Kashmir Registration of Societies Act, 1898 was an instrumentality or agency of the State and the Central Government; consequently, it was an authority within the meaning of Article 12.<sup>26</sup> The declaration of law laid down in the *International Airport Authority* decision is the law of the land. Any different view taken by High Courts contrary to the Supreme Court's decision is incorrect.

<sup>22</sup> *Swapan K. Das v. Secretary, Lalit Kala Academy*, A.I.R. 1990 Notes of Cases 129 (Cal.).

<sup>23</sup> *Ram Prasad v. Indian Institute of Bankers*, A.I.R. 1992 P&H 1 (FB).

<sup>24</sup> *Praga Tools Corporation v. C.A. Imanual*, (1969) 1 S.C.C. 585.

<sup>25</sup> *Sabhajit Tewary v. Union of India*, AIR 1975 S.C. 1329.

<sup>26</sup> *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 S.C.C. 722 : AIR 1987 SC 487.

## CHAPTER 3

### OBJECTIVES OF PUBLIC SECTOR AND THE STATISTICAL PICTURE

#### 3.1 Difficulties experienced

It has been stated to us, that the wide scope for judicial review of acts and omissions of public sector undertakings, resulting from the interpretation placed on Article 12 of the Constitution, clogs the functioning of public sector undertakings, in matters of contract, service conditions and other matters.

#### 3.2 Major objections

We will deal with the problems *seriatim*, as stated in the reference material, to consider whether the judicial decisions holding the public sector undertakings to be "Authority" within the meaning of Article 12 have affected the efficiency of these undertakings or created serious hurdles in carrying on the activities of these undertakings in a business-like manner. Before doing so, we consider it necessary to examine the major objectives of public undertakings. In order to ascertain the main objectives of public undertakings, it is necessary to bear in mind the Directive Principles of State Policy enunciated in Part IV of the Constitution. Article 38 enjoins the State to promote the welfare of the people by securing and protecting effectively a social order in which justice, social, economic and political, shall inform all the institutions of the national life. The State is further directed to strive to minimise inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only among individuals, but also amongst groups of people residing in different areas or engaged in different vocations. This Article, and other Articles e.g. 39, 39A, 41, 42 and 46, lay down fundamental policies, which the State is required to follow in making laws with a view to securing a welfare State. Though Directive Principles are not justiciable and the Courts cannot enforce them, still those are binding on the various organs of the State. The Union government, with a view to securing a welfare State, prepared Five Year Plans for the transformation of society. It took steps for growth and increase in the sphere of industrial development, as stated in the Industrial Policy Resolutions of 1948 and 1956. The Industrial Policy Resolution of 1956 clearly stated that for the adoption of the socialistic pattern of society as a national objective, and also for planned and rapid development, it was required that all sectors which are of basic and strategic importance, or which are in the nature of public utility services, should be in the public sector. In furtherance of this Industrial Policy, a number of public sector undertakings were constituted. The legislative history leading to the establishment of the public sector undertakings is discussed in detail in Chapter 1 of the 126th Report of the Law Commission. The public sector undertakings function under the control and direction of the Government; and, as such, they have to function in a manner expected from "State", even in its commercial sphere. No doubt, the primary purpose of public sector undertaking is to promote economic growth by increased production and to secure adequate return which would help the State in providing social, economic, educational and medical facilities to the people. Nonetheless, unlike private undertakings, the public sector undertakings are not required to be profit-oriented only. Since some of the undertakings deal with public utility services, they have to frame and mould their policies to serve the people even though there is no profit. The Supreme Court in the case of *Oil and Natural Gas Commission*<sup>1</sup> held that "the notion that the 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 loss basis or on a minimum profit basis. This is not a correct approach. In the case of vital commodities or services, while private concerns must be allowed a minimal return on capital invested, public undertakings or utilities may even have to run at losses, if need be and even a minimal return may not be assured. In the case of less vital, but still basic, commodities, they may be required to cater to needs with a minimal profit margin for themselves. But, given a favourable area of operation, "commercial profits need not be either anathema or forbidden fruit, even to public sector enterprises."

#### 3.3 The aspect of efficiency

Efficiency in running a public sector undertaking is not related to the High Courts and Supreme Courts interference under Articles 226 and 32 of the Constitution. On the other hand, the efficiency depends upon the efficiency of the officers and workers connected with the undertaking. The efficiency is related to planning, hard work, devotion to duty, honesty and integrity of all those who are working with the undertaking. Court's interference is called for, when there is infraction of law or of constitutional provisions. High Courts and Supreme Court would interfere with the orders or functions of public sector undertakings, only when there is violation of

<sup>1</sup> *O.N.G.C. v. The Association of Natural Gas Consuming Industries of Gujarat*, 1993 (1) SCALE 900, para 31.

fundamental rights under Part III of the Constitution. Such limited interference cannot, and should not, affect the efficiency of the undertakings. The fundamental rights as contained in Part III of the Constitution are sacrosanct and every authority in the country is bound to act in accordance with the constitutional provisions and to mould its policies and orders consistently with the fundamental rights. It is no valid argument to say, that judicial interference in a case of complaint of violation of fundamental rights leads to inefficiency or clogs progress and development of public sector undertaking. A public sector undertaking, like any other State organ or authority, has to respect the law of the land and the Constitution.

### 3.4 The statistical picture : Commercial matters

We have stated above, in an abstract form, the difficulties stated to be felt by the public sector undertakings in the context of Article 12. We should now say a few words about the statistics that we have been able to get from the Bureau of Public Enterprises.<sup>2</sup> We should mention here, that these statistics relate to 21 public sector undertakings. The total number of public sector undertakings as on 31st March, 1991 was 244. Against these 21 public sector undertakings, 268 writ petitions were filed during the period in question (9 years) (broadly 1981 to 1989). Out of the total 268 writ petitions, 183 related to commercial transactions.

About one third of the public sector undertakings covered in the sample data had no cases at all. Three public sector undertakings had 1 case each. 7 public sector undertakings had less than 10 cases, 2 public sector undertakings, namely, the Mines and Minerals Trading Corporation and the Food Corporation of India, had 81 and 45 cases respectively, relating to commercial transactions

### 3.5 Statistics as to service matters

Coming to the writ petitions relating to service matters (85 as per sample data) the figures supplied by the Bureau of Public Enterprises relate to recruitment, promotion, dismissal, seniority etc. The break up of the service matters is : (i) recruitment 11 cases, (ii) dismissals 22 cases, and (iii) seniority/ promotion etc. 52 cases.<sup>3</sup> However, 16 public sector undertakings had no pending case pertaining to recruitment, 13 public sector undertakings had no case relating to dismissal and 12 public sector undertakings had no cases in the category of seniority/promotion etc. Thus, on an average, 14 public sector undertakings out of 21 had no case in the field of service matters. Only 7 public sector undertakings accounted for 85 writ petitions, which comes to about 30 per cent of the total litigation.

### 3.6 Overall picture

Taking the overall picture, on the whole, 3 Public Sector Undertakings, namely, Neyveli Lignite Corporation, Mines and Minerals Trading Corporation and Food Corporation of India, account for nearly two-third of the total litigation against the public sector undertakings. In terms of percentage, about 7 per cent of the public sector undertakings are responsible for more than 65 per cent of litigation against the public sector undertakings in the sample survey.

### 3.7 Figures given in 126th Report

At this stage, reference may also be made to the Report of the Law Commission already mentioned by us<sup>4</sup> (126th Report), where a tabular statement of the quantum of cases filed in courts by or against public sector undertakings is given, alongwith the expenditure incurred during five years i.e. 1981, 1982, 1983-85/1986/1987. The Commission pointed out<sup>5</sup> that from amongst public sector undertakings, nationalised banks and financial institutions had been responsible for a large amount of litigation.<sup>6</sup> The Commission stressed the factor of lack of responsibility on the part of the managerial executives in resolving disputes. Elsewhere in its Report,<sup>7</sup> the Commission highlighted the major causes for mounting litigation in the public sector as under :—

- (i) lack of accountability;
- (ii) corruption ;
- (iii) eccentric approach of officers in service matters.

<sup>2</sup> Director, Bureau of Public Enterprises, letter dated 5th February, 1991.

<sup>4</sup> Law Commission of India, 126th Report (Government and Public Sector Undertaking Litigation Policy and Strategies), Annexure V pages 63—72.

<sup>3</sup> Director, Bureau of Public Enterprises, letter dated 5th February, 1991.

<sup>5</sup> 126th Report, pages 38—39, para 7.3.

<sup>6</sup> 126th Report, page 17, para 2.261.

<sup>7</sup> 126th Report, page 38, para 7.1.

In the same Report,<sup>8</sup> several specific instances of litigation have been narrated, with detailed comments as to how the suits or proceedings could have been avoided by the public sector undertakings concerned.

### 3.8 Committee of Public Undertakings : 9th Report (10th Lok Sabha)

It is also necessary to refer to the recent report<sup>9</sup> of the Committee on Public Undertakings, relating to litigations pending for settlement in public sector undertakings.

The report (para 1.9) gives the relevant figures and further (para 1.10 or 1.32) examines in detail some 11 glaring cases of litigation. While the Committee (Report para 2.2) made it clear that detailed examination was in progress, yet the drift of the Report, based on the sample survey and selective examination by the Committee, is clearly in the direction of the need to reduce expenditure on litigation that is unproductive. We cannot avoid quoting paragraph 2.3 of the Report, which reads as under :—

“2.3. On a random study of information received from public undertakings the Committee are perturbed to find a large number of litigations pending for settlement involving expenditure on fees etc. and wastage of public time notwithstanding repeated Government instructions to the contrary from time to time. What further agitates the Committee is the number of pending litigations relating to trivial matters or petty claims, some of which have been hanging fire for more than fifteen years. It hardly needs mention that in many such cases money spent on litigation is far in excess of the stakes involved, besides wasting valuable time and energy of the concerned parties as well as the court.”

These reports clearly indicate that Public Sector Undertakings have not acted reasonably to settle trivial disputes. Instead, they have indulged in litigation over trivial matters. How, then, can Courts be blamed for inefficiency in running the public sector undertakings? The plea raised on behalf of public sector undertakings is without force.

<sup>8</sup>. 126th Report, Chapter 4.

<sup>9</sup>. Committee on Public Undertakings, (Tenth Lok Sabha, 9th Report) 20 August, 1992, Litigations Pending for Settlement in Public Undertakings.

## CHAPTER 4

### SOME MINOR CLARIFICATIONS

#### 4.1 Scope of the Chapter.

Before we deal with the major issue whether an amendment of Article 12 of the Constitution, as suggested, is desirable, it would be convenient if certain matters are clarified, because, in our view, the problems said to have been created by the interpretation of Article 12 do not have a material bearing on those points. We proceed to deal with them, one by one.

#### 4.2. Article 311 of the Constitution.

At the outset, we must mention that employees of public sector undertakings do not enjoy the benefits of Article 311 of the Constitution. Broadly speaking, that Article provides certain safeguards to civil servants against dismissal, removal or reduction in rank without complying with the provisions of that Article. Two major safeguards are, (i) that a person holding a civil post under the Union or a State shall not be dismissed or removed by an authority subordinate to that by which he was appointed; and, (ii) that he shall not be dismissed, removed or reduced in rank without an inquiry in which he has been informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges. This Article does not apply to a person who does not hold a "civil post under the Union or a State". Since public sector undertakings are, in juristic theory, separate from the Government as such, and since their employees are not paid out of the Consolidated Fund of the Government, they do not hold a civil post. Consequentially, Article 311 does not apply to them.<sup>1</sup> The point hardly needs further elaboration. But it may be useful to quote the following passage from a decision of the Supreme Court<sup>2</sup> :

"While we were referring to the cases in an earlier part of our judgment, we have noticed the caution indicated by this court that even if some institution becomes 'State' within the meaning of Article 12, its employees do not become holders of civil posts so as to become entitled to the cover of Article 311. They would, however, be entitled to the benefits of Part III of the Constitution."

It has been pointed out that employees of the public sector undertakings do not enjoy the protection of Article 311, for the simple reason that undertakings are legal entities, separate from the Government<sup>3</sup>. Even a statutory undertaking is not regarded as "State" for the purposes<sup>4</sup> of Article 311.

#### 4.3 Problems of documents

A point has been made<sup>5</sup> that if there is litigation between a private person and agency A, and, in that litigation, the private party tenders in evidence a document issued by agency B, difficulties arise because (it is stated) the document issued by one instrumentality is supposed to be accepted by all agencies in the public sector. We are afraid that such a plea cannot, as per the provisions of the Evidence Act, be taken successfully in a court. Probably, such a stand is taken, or sought to be taken, by litigants in the light of the provisions of the Indian Evidence Act, 1872 relating to "Public documents". But we should point out that as per the concept of public documents envisaged by that Act, a document issued by a public sector undertaking does not necessarily become a public document. In the scheme of that Act, a document must satisfy the statutory requirement, before it could fall in the category of public document. In this connection, we would like to refer to the provisions of sections 74 and 75 of that Act, which read as under :—

"74. *Public documents.*—The following documents are public documents:—

- (1) Documents forming the acts, or records of the acts—
  - (i) of the sovereign authority,

<sup>1</sup> (a) *Sukhdev Singh v. Bhagat Ram*, AIR 1975 SC 1331;

(b) *Somprakash Rekhi v. Union of India*, (1981) 1 SCC 449, 463 para 29;

(c) *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722, para 12;

(d) *A.R. Kalra v. P & E Corporation of India*, AIR 1984 SC 1361, para 20.

<sup>2</sup> *Tekhraj v. Union of India*, AIR 1988 SC 469, para 21.

<sup>3</sup> *Guru Gobinda v. Shankari Prasad*, AIR 1964 SC 254, 258; *Mafatlal v. Divisional Controller*, AIR 1966 SC 1364.

<sup>4</sup> *State of Bihar v. Union of India*, (1970) 1 SCC 67, 75.

<sup>5</sup> See para 1.3., last sub-paragraph *supra*.

- (ii) of official bodies and tribunals, and
- (iii) of public officers, legislative, judicial and executive of any part of India or of the Commonwealth or of a foreign country.

(2) Public records kept in any State of private documents.”

“75. *Private documents.*—All other documents are private.”

It will be seen that the definition of “public documents” in section 74 would not cover public sector undertakings and their officers. They cannot be regarded as “official bodies and tribunals.” As regards the expression “public officers” which occurs in section 74 (and is not defined in the Evidence Act) one can at best, consult section 2(17) of the Code of Civil Procedure, 1908. The enumeration of various persons to be regarded as “public officers” in that clause does not cover employees of public sector undertakings.

Further, it has been held that an officer of a body corporate cannot be a public officer<sup>6</sup>. Officers of the Food Corporation of India, a public sector undertaking, are not “Public Officers” within the meaning of section 2(17)(h) and section 80 of the Code of Civil Procedure.<sup>7</sup> This view has been approved by the Supreme Court also.<sup>8</sup> In spite of the control and supervision exercised by the State Government on the funds and activities of the State Electricity Board, it cannot be held to constitute “Government” and its officers cannot be regarded as “Public Officers” for the purpose of section 80 of the Civil Procedure Code.<sup>9</sup> Probably, some misconception seems to have arisen because, for the purposes of the Indian Penal Code, the expression “public servant” has been defined as denoting a person falling under the specified descriptions, and Clause “twelfth” of section 21, which covers the following :—

Every person—

- (a) In the service or pay of the Government or remunerated by fees or commission for the performance of any public duty by the Government;
- (b) In the service or pay of a local authority, a corporation established by or under a Central, Provincial or State Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956).

It should be pointed out that even the definition in the Penal Code defines the expression “public servant” and not the expression “public officer”. Its main object is to (i) deal effectively with the offence of bribery which (under the Code as enacted) is defined in terms of public servants; (ii) make effective provisions for certain offences against public servants, including contempts of the lawful authority of the public servants; (iii) deal with conduct which becomes aggravated when committed by or against a public servant; and (iv) make provisions for the connected sections of the Code of Criminal Procedure, 1973, particularly section 197, under which, certain public servants cannot be prosecuted for any offence alleged to have been committed by them while acting or purporting to act in the discharge of their official duties, except with the previous sanction of the appropriate Government. The definition of Public servant in the Penal Code has no relevance for construing the expression “public officer” as occurring in the Evidence Act.

#### 4.4 Injunctions

Since a point is often made<sup>10</sup> regarding temporary injunctions issued by courts against public authorities, it becomes necessary to offer a brief analysis of the relevant provisions of the law. We leave aside permanent injunctions, which are governed by section 38 of the Specific Relief Act, 1963 and concentrate on the issue of temporary injunctions under the Civil Procedure Code. Injunctions concerning property are provided for by Order 39, rule 1 of the Code. The more frequently invoked provision in the context of public sector undertakings would appear to be Order 39, rule 2(1), which we quote below :—

“2(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any breach of contract or injury of like kind arising out of the same contract or relating to the same property or right.”

<sup>6</sup> *Renuka Batra v. Grindlays Bank Ltd., Amritsar*, AIR 1980 P & H 146.

<sup>7</sup> *Kanta Prasad Singh v. Food Corporation of India*, A.I.R. 1974 Patna 376.

<sup>8</sup> *Coal Mines Provident Fund Commissioner v. Ramesh Chander Jha*, A.I.R. 1990 SC 648.

<sup>9</sup> *V. Padmanabhan Nair v. Kerala State Electricity Board*, A.I.R. 1989 Kerala 86.

<sup>10</sup> Paragraph 1.3, second and third sub-paragraphs, *supra*.

#### 4.5. Considerations for the grant of Injunctions.

It will be noticed<sup>11</sup> that a temporary injunction can be granted, only if it is required for restraining the defendant from committing a breach of contract or other injury of any kind under Order 39, rule 2(1) of the Code of Civil Procedure, 1908. By and large, "injury" denotes violation of a legal obligation. But the mere fact that one party alleges the possibility of an injury, does not necessarily entitle him to a temporary injunction. Well established propositions exist on the subject<sup>12</sup>. Speaking very briefly, the court will take into reckoning the following guidelines<sup>13</sup> :—

- (1) Whether the person seeking temporary injunction has made out a *prima facie* case. This is a *sine qua non*.
- (2) Whether the balance of convenience is in his favour. i.e. whether it could cause greater inconvenience to him if the injunction is not granted, than the inconvenience which the other side would be put to, if the injunction is granted. As to that, the governing principle is, whether the party seeking injunction could be adequately compensated by awarding damages and the defendant would be in a financial position to pay them.
- (3) Whether the person seeking temporary injunction would suffer irreparable injury, if the injunction is not granted. With the first condition as *sine qua non*, at least two conditions should be satisfied by the petitioner and a mere proof of one of the three conditions does not entitle a person to obtain temporary injunction.

#### 4.6. Injunctions against public sector undertakings.

It is needless to add that the benefit of these restrictions<sup>14</sup> on the discretion to issue temporary injunctions are available as much to public sector undertakings, as to undertakings in the private sector. For example, it has been held that in a matter touching the discipline or the administration of the internal affairs of a university, the court would not interfere by injunction, unless a strong *prima facie* case is made out.<sup>15</sup> Conversely, where the plaintiff, a handling contractor engaged in handling iron and steel materials the Durgapur Stockyard of the defendant company sued for permanent injunction and also prayed for temporary injunction to restrain the defendant company from making deductions from its running bills, the plaintiff's prayer was allowed and temporary injunction granted because (i) he had made out a *prima facie* case; (ii) deductions would cause him considerable inconvenience in the performance of the job; and (iii) not granting an injunction would mean irreparable injury to the plaintiff.<sup>16</sup>

In an interesting case which also involved a public authority, the Allahabad High Court has discussed the ingredients required for the grant of interlocutory injunction; and it seems to be useful to devote a few lines to its judgment.<sup>17</sup> Relying, *inter alia*, on the House of Lords decision in *American Cyanamide Co.*,<sup>18</sup> the High Court emphasised that the three requirements for obtaining an injunction are—*Prima facie* case, balance of convenience and irreparable injury. It also pointed out that the House of Lords had placed great emphasis on the balance of convenience. As to interference by the High Court in appeal, the Allahabad High Court expressed itself as under :—

"A court of appeal against the judgment of granting or refusing to grant injunction can interfere when the order passed is arbitrary or is passed by not taking into account the relevant considerations. The court below gave a go-by to all the principles of law and, most arbitrarily and without applying its mind to the requirements, granted the injunction restraining the defendants from realising the unpaid instalments. The judgment shows that the learned Judge thought that the interlocutory injunction could be given as a matter of course. Its granting rests in the sound discretion of the court, to be exercised in accordance with well settled equitable principles and in the light of all the facts and circumstances of the case. The discretion of the court does not include a misapplication of the law or an obvious error in the application of the principles of equity. The character of injunction being extraordinary, it should be exercised sparingly and cautiously. After thoughtful deliberation injunction should be given or awarded only in clear cases."

<sup>11</sup> Paragraph 4.4, *supra*.

<sup>12</sup> *Dorab Cawasji Warden v. Comi Sorab Warden*, A.I.R. 1990 SC 867 Pr. 14-15.

<sup>13</sup> Mulla, Code of Civil Procedure (abridged edition, 1990), page 1006.

<sup>14</sup> Paragraph 4.5 *supra*.

<sup>15</sup> *V.S. Vishwavidyalaya v. Raj Kishore Tripathi*, AIR 1977 SC 615.

<sup>16</sup> *S. Krishnaswamy v. South India Film Chamber of Commerce*, AIR 1969 Mad. 42.

<sup>17</sup> *U.P. Awasthi Vikas Parishad v. N.V. Rajagopalan Acharya*, AIR 1989 All. 125, 127, 128, 129, paragraphs 11 to 15 (K.C. Agarwal & B.L. Yadav, JJ).

<sup>18</sup> *American Cyanamid Co. v. Ethicon Ltd.*, (1975) 1 All E.R. 504 (H.L.).



On the facts, the order of the trial court, restraining the defendant Vikas Parishad from realising from the plaintiff unpaid instalments claimed towards the hire purchase agreement of flats, was set aside.

In a recent case<sup>19</sup> the Supreme Court has considered in detail the question of grant of interlocutory mandatory injunctions. The Court observed that interlocutory mandatory injunctions are granted generally.

- (a) to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing (when full relief may be granted), or
- (b) to compel the undoing of those acts that have been illegally done, or the restoration of those which were wrongfully taken from the party complaining.

But, since (i) the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or, (ii) alternatively, not granting it to a party who succeeds or would succeed, may equally cause great injustice or irreparable harm; Courts have evolved certain guidelines. The Court stated the guidelines as under :—

- (1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction.
- (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
- (3) The balance of convenience is in favour of the one seeking such relief.

#### 4.7. Bank guarantees

A few words also appear to be necessary on the subject of bank guarantees. Notwithstanding the belief in certain quarters to the contrary, the correct law is, that where there is a bank guarantee and no *prima facie* case of fraud, courts should not restrain the enforcement of the bank guarantee<sup>20</sup>. If there is any irrevocable commitment or obligation of the bank, either in the form of a confirmed bank guarantee or letters of credit, the guarantee must ordinarily be honoured free from interference by the courts, unless there is a *prima facie* case of fraud or a special equity.<sup>21</sup> Courts should seldom restrict the holder of the guarantee from enforcing it<sup>22</sup>.

#### 4.8. Article 12 and injunctions.

Finally, we would like to point out that the applicability or non-applicability of Article 12 to public sector undertakings is not relevant on the subject of injunctions. Everything depends on the grounds on which the temporary injunction is prayed for. If it is a ground which owes its justiciability *only* to fundamental rights, then the exclusion of public sector undertakings from article 12 may make a difference. But if it is a ground available to every person and against every person under the ordinary law, say, wrongful interference with property or possession or commission of a breach of contract or other injury, then it matters little whether Article 12 is attracted or not. For the violation of a right, even if it is not a fundamental right, relief by way of injunction in an otherwise appropriate case is available under Order 39, rules 1 and 2 of the Code of Civil procedure, 1908,<sup>23</sup> whether the opposite party is a public sector undertaking or a private party.

<sup>19</sup> *Dorab Cawasji Warden v. Coomi Sorab Warden*, AIR 1990 SC 867, at page 873 pr. 14.

<sup>20</sup> *United Commercial Bank v. Bank of India*, AIR 1981 SC 1426.

<sup>21</sup> *Ashim Ganguly v. Indian Oxygen Ltd.*, AIR 1989 Cal. 150, 153, 154.

<sup>22</sup> *U.P. Co-operative Federation Ltd., v. Singh Consultants*, (1988) 1 SCC 174.

<sup>23</sup> Paragraph 4.5, *supra*.



major contract can go to court if the conditions laid down in the notice inviting bids for pre-qualification have not been adhered to. None of them can invoke fundamental rights or the provisions for writs; but 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.

In the practice of management 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. Strangely enough, an essentially managerial act such as the framing of job specifications becomes in Government virtually a legislative act; 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, and so on. 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 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 their case, as in Government, the framing of job specifications and 'recruitment rules' become virtually 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."

### 5.5 The beneficiaries

A point of detail which can be subsumed under the above point, but which may still require specific mention, is the criticism that no great public purpose is served by the present position, as those who derive advantage from it (by ready access to writ petitions) are not the general public, but certain groups, such as employees, tenderers and contractors.<sup>2</sup> It has been added that even in the case of protection of employees, it is largely white-collar workers and middle level management who widely benefit from this. This argument has been thus elaborated :

"Industrial workers are covered by elaborate legislation relating to industrial disputes, payment of wages, workmen's compensation, etc. which applies to public and private enterprises alike; they also have the power of industrial action. Workers therefore do not necessarily derive any specific advantage from the treatment of public enterprises as 'State'. The white-collar workers and managers do; but is this a desirable protection? We had noted earlier that one of the judges in a dissenting judgment had expressed doubts about the creation of a vast class of neo-Government servants. Is it necessary to extend to the employees of public enterprises the kind of protection which is available to civil servants (the desirability of which in itself is open to question)? Should the top-level management of a public enterprise which is a commercial organisation set up for business purposes be prevented from exercising the kind of judgment and selectivity, whether in regard to personnel matters or in regard to contractual matters, that private sector chief executives exercise as a matter of course?"

### 5.6 Inter-connection between the arguments

For the sake of convenience, in the above paragraphs, the various points of importance have been mentioned under different heads. But this need not make us oblivious to the fact, that they are all inter-connected with each other; and the whole case for the introduction of an amendment to Article 12 (as put by those who argue for it) can be summed up in the broad proposition that —

- (a) proper functioning of the public sector undertakings pre-supposes that such functioning should not be hedged in by constraints of the nature that flow from the applicability of Article 12 of the Constitution to public sector undertakings ;
- (b) the principal beneficiaries of the present position are employees of the higher level or middle level, prospective contractors and actual contractors with these undertakings, on whom a special benefit is conferred which is not enjoyed by those who are employed under, or have commercial dealings with, undertakings in the private sector or private individuals.

\* Ramaswamy R. Iyer, "Enterprises as State and Articles 12" (25th August, 1990), Economic and Political Weekly, pages M129 to M134 (at page 133).

### 5.7 Arguments against amendment : business principles

The argument that the management of undertakings in the public sector should be conducted on sound business principles may appear very attractive at the first sight, and no one can deny that this ideal should be kept by each undertaking before itself and implemented as far as possible. But, in stressing this argument, one need not overlook the fact that in some form or other, these undertakings possess a public element, as their very name indicates. From the fact that they possess such a public element, certain consequences conceivably follow, one of which is that their actions sought to be open to judicial review on certain well defined grounds. This is not the place for entering into a detailed exposition of the grounds for judicial review of State action. But it is well understood that violation of the law, non-compliance with the procedure laid down in law, want of sufficient factual material, perversity in coming to a conclusion, acting malafide or on collateral considerations and (according to recent developments), unreasonableness, are some of the important grounds for such judicial review. These grounds become applicable in theory, where the action is that of the State. No doubt, one can legitimately ask the question why the court should insist on the observance of the relevant norms embraced by the grounds mentioned above, in the case of public sector undertakings. The answer must be found, and can be found without much difficulty, in the very fact that these are "public". Constitutional scholars have written at length on the various indicia which are considered relevant in order to constitute an undertaking into a "State". But, for the present purpose, it is sufficient to mention that in some form or other, these undertakings have a connection with the State and the public.

"By extending the executive power of the Union and each of the States to the carrying on of any trade or business, Article 298 does not, however, convert either the Union of India or any of the States which collectively form the Union into a merchant buying and selling goods or carrying on either trading or business activity, for the executive power of the Union and of the States, whether in the field of trade or business or in any other field, is always subject to Constitutional limitations and particularly the provisions relating to Fundamental Rights, in Part III of the Constitution and is exercisable in accordance with and for the furtherance of the Directive Principles of State Policy prescribed by Part IV of the Constitution."<sup>3</sup>

As regards the public character of the public sector undertakings, the Supreme Court as observed that it must be kept in mind that the employment under the public undertakings is a public employment and a public property. It is not only the undertakings, but also the society, which has a stake in them for their proper and efficient working.<sup>3A</sup> This connection has many facets, several of which have been stressed or highlighted in the judicial decisions on the subject dealing with the concept of "State" as embracing public sector undertakings. But the golden thread that binds them all together, is the broad proposition that there is a public element. This public element is occasionally traced to the fact that the undertaking in question owed its existence to a statute. At times, it is the nature of the functions which they perform that receives emphasis from the courts. The financial support given by the State may also be regarded as relevant, along with other factors. The concept of "instrumentality or agency of State", often relied on in this contexts, is another way of saying that these undertakings are projections of the State or emanations of the personality of the State. The degree of control or the intensity of the inter-link between the State and the undertaking will naturally differ from undertaking to undertaking; but the essential idea is the connection between the State (in the conventional sense) and the particular undertaking. No particular test is sufficient or conclusive in itself; so many criteria may be kept in mind. The result reached, is not on the exclusive application of one or two criteria, but on an evaluation, *in toto*, of the nature and character of the undertaking. One particular undertaking may be nothing but the "alter ego" of the State, because the bond between that undertaking and the Government is very strong and fully visible—which is why the expression "deep and pervasive control" is often employed in judicial pronouncements. Such undertakings will be easily regarded as falling within the ambit of the "State". At the other extreme, may be a undertaking whose link with the State is thin and fragile; in such a case, it may be difficult to call it "State". Take, again, the financial aspect. An undertaking may be substantially dependent on the resources of the Government and the court may find it easy to hold it as "State". At the opposite extreme, there might stand an undertaking in which the financial stakes of the Government are minor or negligible; the court may be justified in adopting a cautious approach before declaring such an undertaking to be a "State". But all these apparently heterogenous criteria essentially pay homage to the central criterion, which assesses the link between the State and the undertaking in order to find out the existence, nature and extent of the "public" character of the undertaking.

### 5.8 Relevance of "public" character

At the risk of some repetition, let us emphasise the proposition that it is the public character of the undertaking that supplies the rationale for equating it with "State", for the purposes of der-

<sup>3</sup> *Central Inland Water Transport Corporation Ltd. and Anr., v. Broja Nath*, A.I.R. 1986 SC. 1571, 1588-89.

<sup>3A</sup> *P.B. Sawant, J. D.T.C. v. workers*, 1990 (Suppl) (2) Scale 1).

tain provisions of the Constitution. If the *dealings* of the undertaking are of a public character, certain norms can be justifiably applied and made binding on the undertaking, while conducting those dealings. The community has a legitimate interest in ensuring fairness in such dealings. Again, leaving aside the aspect of dealings, if the funds of the undertaking come substantially from the Government, the community can be regarded as having an interest in the manner in which the business is conducted with the aid of those funds. Similarly, if the broad range of functions performed by the undertaking (even where it is not entering into contract, as such, on frequent occasions) partakes of the character of public welfare, no one can deny that certain principles must be observed.

### 5.9 Dichotomy of business principles and availability of writ jurisdiction

It would appear that those who argue for amending Article 12, assume that there is a conflict between good business principles or sound management and the applicability of constitutional provisions regarding fundamental rights and the like, in regard to such undertakings. But we believe that the conflict is more apparent than real. The fallacy lies in assuming that every action of the undertaking can be set aside by the court. The truth is, that only illegal, arbitrary or unreasonable action is open to judicial review. No doubt, an application (by writ or otherwise) for judicial review can be initiated by a citizen against any order or action, because one cannot prevent the citizen from approaching the court. But this does not mean that the citizen will necessarily succeed in every case. A citizen so minded can initiate proceedings even against a private sector undertaking; but he will not necessarily succeed, if there is no cause of action. The courts are open; but success after entering the portals of the court does not necessarily go with the right to enter the court.

### 5.10 The aspect of autonomy

Much of what we have said above should suffice to constitute a satisfactory answer, in so far as the aspect of autonomy is sought to be emphasised. Undoubtedly, there must be speedy disposal of business and willingness to accept responsibility on the part of the public sector. But it must be pointed out that this applies as much to organs of the Government in the narrow sense, as it applies to undertakings in the public sector. Governmental authorities also have to function with a sense of responsibility and with reasonable speed; and yet, they are subject to fundamental rights.

### 5.11 The aspect of management

One of the aspect on which emphasis has been placed while arguing for amendment of Article 12, is that of maintaining a quality of management in public sector undertakings. It has been particularly emphasised that these undertakings, when dealing with contracts or the relationship of employment, should be allowed to be conducted with efficiency and speed and these objectives often come to be thwarted by reason of the present interpretation of Article 12, which makes them subject to judicial scrutiny and throws open the possibility of litigation and subject to judicial scrutiny which obstructs the smooth conduct of their business. On a careful consideration of the matter, it appears to us that there are several answers to this objection. In the first place, we are not certain if the fact that writ jurisdiction can be invoked necessarily obstructs smooth functioning in every case. It is undisputed that such jurisdiction has been exercisable ever since the commencement of the Constitution against acts of the Central Government and the State Government and its officers and authorities. There has not been any serious grievance made that the jurisdiction has come in the way of expeditious disposal of governmental business in dealing with commercial transactions.

Railways and Posts and Telegraphs are noteworthy examples of commercial or semi-commercial activities directly carried on by the Government, and we are not aware of any serious complaints made by the concerned Departments in this regard. Secondly, if the grant of stay orders in writ petitions against public sector undertakings (on the basis of the alleged violation of a fundamental right) does occasionally suspend completion of the particular transaction, one has to balance against it the higher values sought to be protected by insistence on compliance with certain constitutional norms. We shall revert to this aspect later. Thirdly, public sector undertakings may themselves have to invoke writ jurisdiction, say, against another public sector undertaking and then some of the benefits of the right to equality and other fundamental rights would be realised. Finally, so far as the element of reasonableness is concerned, it is possible that the courts may spell out such a requirement, not merely on the basis of constitutional rights (as they have done so far, because the provisions were there), but also in the light of the implications of statutory interpretation. In this connection, attention may be drawn to the fact that even in countries like England where, as yet, no fundamental rights have been written in the Constitution, courts are, as a matter of administrative law, slowly taking the view that statutory action, particularly action which affects the rights of citizens, should be marked by a reasonable approach. Even if Article 12 is amended so as to confine it to Government authority, courts can still take the same view in regard to public undertakings as a matter of statutory interpretation.

### 5.12 Beneficiaries of the present position.

In support of the proposed amendment, it has been argued that the main beneficiaries of the present position are contractors or prospective contractors with the public sector and higher level employees. The assumption is that they need not be given such benefits. It seems to us that in making this point, the basic reasoning on which the relevant Articles of the Constitution have come to be regarded as applicable to public sector undertakings have been overlooked. The constitutional rights are meant for every citizen, under Article 19, but the right to equality is available to every person, under Article 14. It may be that occasionally, frivolous cases are filed by contractors or employees. But the courts are not totally helpless in the matter. They can award compensatory as well as exemplary costs. We would also like to emphasise that the beneficiaries of the availability of writ against public sector undertakings are not merely employees or contractors. They could be honest, public-spirited institutions or individuals. This is illustrated vividly by a recent judgment<sup>4</sup> in which the court upheld a Gujarat judgment applying the provisions of Article 19(1)(a) of the Constitution, so as to require the house magazine of the Life Insurance Corporation to publish the petitioner's rejoinder on a matter of public interest concerning the Corporation. In fact, many of the cases referred to in the earlier Report of the Law Commission, or included in the statistical material mentioned in that Report related to litigation filed against the Life Insurance Corporation (or other public sector undertakings) by persons other than employees and contractors.<sup>5</sup>

### 5.13 The fundamental issue : Equality

What has been stated in the preceding few paragraphs is by way of dealing with the main grievances made against the present position by those concerned. Much more important is the basic question of constitutional objections. Leaving aside specific provisions in Part III of the Constitution, one has still to take note of the philosophy of equality, enunciated in the Preamble to the Constitution. Consistent with this philosophy, it will be difficult to take the stand that public authorities and public undertakings should be allowed to operate in a manner which will not take notice of equality. It would be found that much of the case law that has emanated in this sphere, where it insists on the absence of arbitrariness in State action, expressly or impliedly derives its lineage from the paramount consideration of equality, which demands that arbitrariness, or a reasonable suspicion of arbitrariness, should be avoided in State action. To give a go-by to the doctrine of equality is to wipe off from the print of the Constitution the ideals which are the inspiring forces underlying the Preamble to the Constitution.

### 5.14 The statistical picture

The Law Commission has been able to obtain certain statistical information (through the Bureau of Public Enterprises), as to cases filed against certain public sector undertakings on the basis of Article 12. The first observation that the Commission would like to make is that the statistical picture is not so forbidding as to cause alarm or justify a major constitutional amendment. The second observation which needs to be made is that at least in the case of certain undertakings,<sup>6</sup> no occasion has arisen when the lowest tenderer has challenged action of the undertaking by way of writ petition. Thirdly, on a study of some of the sample cases, it appears that at times, there are plausible grounds of objection on the part of the contractor to the action taken or proposed to be taken by the public sector undertaking. It will not be convenient in this Report to go into details. But, by way of example, we may mention that occasionally (in the case of contractors) there is a bonafide dispute about the acceleration of price by the undertaking. There are also cases where the award of a contract has been refused on the ground that the contractor had not paid dues to the labour and the dispute in this regard was made the subject matter of a writ petition by the contractor. Such disputes cannot be said to be totally groundless.

### 5.15 Situation regarding lowest tender

It will appear from some of the letters on the Law Commission file (as received from the public sector undertakings through the Bureau of Public Enterprises) that an impression seems to prevail that the person who has given the lowest tender must be awarded the contract, whatever be the credentials or background of the tenderer. It is because of this impression that the suggestion has been made<sup>7</sup>, that if the public sector undertakings are excluded from the applicability of Article 12, it would help the functioning of the undertakings. "This would provide flexibility to the undertakings to reject the lowest tender in case the performance of the tenderer is regarded as unsatisfactory or his credentials are considered to be questionable." It is further stated that similarly, the requirement of a show cause notice before stopping dealings with a contractor or debarring him from preferring tenders "is always onerous and open to challenge in courts of law and in case this requirement is removed, it would strengthen the hands of the undertakings because their action will not be subjected to judicial scrutiny."

<sup>4</sup> L.I.C. v. Manubhai D. Shah, JT 1992 (4) SC 181.

<sup>5</sup> Law Commission of India 126th Report, paragraphs 4.7 to 4.11. See also 112th Report on section 45 of the Insurance Act, 1938.

<sup>6</sup> Letter dated 6th February, 1989.

<sup>7</sup> Letter dated 13th February, 1989.

While we appreciate the desire for quick and efficient functioning of undertakings in the matter of award of contracts, we would like to point out that it is not the law that the lowest tender can never be rejected. What the law insists upon, is that the action of this nature, if taken in regard to a tenderer should be based on some reasons and should be taken after giving the tenderer an opportunity of hearing. The law does not even require that the reason given by a department or undertaking for not accepting the lowest tender should be one which is necessarily acceptable to the court. All that the courts demand is that there should exist on the file some plausible justification for the State action and that the opportunity to be given should be reasonable. No elaborate or lengthy inquiry is contemplated and it is believed that the court will pay attention to the substance of the matter rather than to the form. At the same time we would like to point out that the law regarding the duty of public authorities to avoid arbitrariness in the matter of acceptance or rejection of tenders is a part of the much wider concept of the rule of law. In a fairly recent case<sup>8</sup>, the Supreme Court, while dealing with the question of acceptance of tenders by a Government company, held that it was too late in the day to contend that an institution like a Government company should be exempt from judicial review where it was carrying on a commercial activity. "An instrumentality of the State has to act within the ambit of Rule of Law and would not be allowed to conduct itself arbitrarily and, in its dealings with the public, would be liable to judicial review." It was on this reasoning that the court expressed itself to be in agreement with the submission of the counsel for the petitioner (namely) "that when highest offers of the type in question are rejected, reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily, the same should be communicated to the concerned parties unless there be any specific justification not to do so."

#### 5.16. Right to information

Indeed, in the context of the duty to communicate reasons,<sup>9</sup> for rejection of highest tender, and in the context of the duty to afford the public an opportunity to express its views on affairs of public sector undertakings,<sup>10</sup> we would like to refer to the exposition of the law in a judgement which is often quoted<sup>11</sup> :

"In a Government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary, when secrecy is claimed for transactions which can, at any rate, have no repercussion on public security. To cover with veil of secrecy, the common routine business, is in the interest of public."

These observations were, no doubt, made in the context of Governmental activity. But the reasoning is substantially applicable to the public sector also.

#### 5.17. Inadvisability of amendment

There are, in fact, certain issues going beyond the narrow topic of tenders and contracts. State action is subjected to judicial review, because it is action in which the public have an interest. The ground of judicial review known as arbitrariness has come on the scene because it is the public which is affected as a whole. The individual whose interests are prejudiced by arbitrary action may appear to be pursuing his own interest, and may look like a very small character in the drama. But, in reality, he is only a vehicle through which a much bigger message is sought to be conveyed. Philosophically (though not legally) he is a minuscule reflection of the great and majestic concept of the Rule of Law. Through each individual that invokes the law for his own cause, what speaks is the voice of the public. From whichever angle one looks at public sector undertakings it is, ultimately their public character that brings them in the same category as the Government proper.

#### 5.18. Function of judicial review

The function of judicial review was put by the House of Lords in words which are felicitous enough to deserve quotation<sup>12</sup>.

" . . . it is not a sufficient answer to say that judicial review of the action of officers or departments of Central Government is unnecessary because they are accountable to Parliament for

<sup>8</sup> *Star Enterprises v City and Industrial Development Corporation of Maharashtra Ltd*, 1990 (3) SCC 280.

<sup>9</sup> Paragraph 5.15 *supra*.

<sup>10</sup> Cf. *L.I.C. v Manubhai D. Shah*, JT 1992 (4) SC 181.

<sup>11</sup> *State of U.P. v. Raj Narain*, (1975) 4 SCC 428.

<sup>12</sup> *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd*, (1981) 2 W.L.R. 722. (HL) (Lord Diplock).

the way in which they carry out their functions. *They are accountable to Parliament for what they do so far as regards efficiency and policy, and, of that, Parliament is the only judge; they are accountable to a court of justice for the lawfulness of what they do, and, of that, the court is the only judge.*"

### 5.19 The aspect of human rights

We believe that it would also be appropriate and important aspect which has been dealt with, in *Ajay Hasia's Case*<sup>13</sup>. The relevant observations are as under :—

"The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red tapism and slow motion but by doing so, the government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the government to assign to a plurality of corporations almost every State business such as Post & Telegraph, TV and Radio, Rail Road and Telephone—in short every economic activity—and thereby cheat the people of India out of the Fundamental Rights guaranteed to them. That would be a mockery of the Constitution and nothing short of treachery and breach of faith with the people of India, because though apparently the corporation will be carrying out these functions. It will in truth and reality be the Government which will be controlling the corporation and carrying out these functions through the instrumentality or agency of the corporation. We cannot by a process of judicial construction allow the fundamental Rights to be rendered futile and meaningless and thereby wipe out Chapter III from the Constitution. That would be contrary to the constitutional faith of the post-Maneka Gandhi era. (*Maneka Gandhi v. UOI* (1978) 1 SCC 248; (1978) 2 SCR 621)."

Somewhat the same aspect was expressed in different words in another case<sup>14</sup> :

"It is a limb of Government, agency of the State, a vicarious creature of statute working on the wheels of the Acquisition Act. We do not mean to say that for purposes of Art. 309 or otherwise, this Government Company is State but limit our holding to Art. 12 and Part III."

We may mention that *the public element* has been relied upon in a few other reactions<sup>15</sup>.

An equally convincing reason was given by Mathew, J. in his concurring judgment in the oft-cited case of *Sukhdev Singh*<sup>16</sup>. His observations are as under :

"A State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State."

### 5.20 Validity of the proposed amendment

We must now turn to the question whether, even if the proposed amendment is sound on the merits, it can be regarded as passing the test of constitutionality. For this purpose, it becomes necessary to quote the tentative proposal in this regard. The proposal is to insert an Explanation below Article 12 as under :

"A statutory corporation, a company formed and registered under the Companies Act, 1936 or a society registered under the Societies Registration Act shall not be considered as 'State' for the purpose of this Part."

We are not dealing with the question of drafting. But we have to point out that the exclusion of statutory undertakings, Government companies and Government aided registered societies from the benefit of Part III of the Constitution is bound to raise the important constitutional issue whether such an amendment does not impair a basic feature of the Constitution. There are at least two decisions of the Supreme Court which are relevant for answering this question. Applying the test of basic features laid down in *Kesavanand Bharati v. State of Kerala*, A.I.R. 1973 SC 1461, the Supreme Court, in *Minerva Mills Ltd.*, A.I.R. 1980 SC 1789, observed (in paragraph 31 of the judgment) that Article 14 of the Constitution (right to equality) is the very foundation of a republican form of Government and is by itself a basic feature of the Constitution." The second judgment is *Vamanarao's case*, A.I.R. 1980 SC 271, which reiterates the theory of basic structure. It must also be pointed out that the proposed amendment will affect not merely Article 14, but possibly *all fundamental rights* in their application to public sector undertakings. Obviously, such an amendment would be regarded as of very far-reaching character and it may be very difficult to defend a challenge to such an amendment, which would take away a large slice of activities, conducted practically under the control of the State, from the ambit of fundamental rights.

<sup>13</sup> *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722, 733 para 7.

<sup>14</sup> *Somprakash Rekhi v. Union of India*, (1981) 1 SCC 449, 463 para 29.

<sup>15</sup> (a) *G.B. Mahajan v. Jalgaon Municipal Council*, (1991) 3 SCC 91 : 1991 SC 1153.  
(b) *N. Parthasarathy v. Controller of Capital Issues*, (1991) 3 SCJ 325.

<sup>16</sup> *Sukhdev Singh v. Bhagat Ram*, AIR 1975 SC 1331.



### 5.21 Role of civil court

It must also be pointed out that even if writ jurisdiction is rendered inapplicable against public sector undertakings as contemplated by the proposed amendment, there can still remain some scope for judicial interference, if the issue raised by the contractor or employee is such that the same can be litigated in an ordinary court. No doubt, the grounds of judicial remedy in a writ case and in an ordinary civil suit may not necessarily be identical. But we are mentioning this aspect in order to emphasise that the possibility of stay orders or injunctions issued by ordinary civil courts would still be there. A temporary injunction can be granted under Order 39, rule 1 of the Code of Civil Procedure, 1908 if an injury is apprehended by the applicant. In this context, "injury" is generally understood as meaning the violation of a legal right. If it is the plea of the contractor that the action taken or proposed to be taken by the undertaking is in breach of contract, obviously there is a possibility of an injunction being issued, provided the case is otherwise fit for injunction. We are referring to this aspect, because we find from the material on the file, that there are several instances of writ petitions where the dispute is about alleged breach of contractual stipulations by a public sector undertaking. Sometimes, the dispute is about increasing the price<sup>17</sup>. Occasionally, the contractor petitions for delivery of specified commodities as per contract, where the commodity is under the control of a public sector undertaking<sup>18</sup>. At times, the dispute is about the interpretation of a rate running contract<sup>19</sup>. In a few other cases, the encashment of bank guarantee was at issue<sup>20</sup>. We need not multiply examples; but we must point out that such matters will continue to be the subject matter of litigation, even after public sector undertakings are removed from the ambit of Article 12. Their *prima facie* justiciability depends on a variety of arguments, whose source lies in legal principles derived from the ordinary law. The relevant principles are not derived *only* from the Constitution.

It is also worth mentioning that in several judicial decisions, it has been pointed out that the word "authority" in Article 226 of the Constitution may have a wider ambit than the agencies mentioned in Article 12. Removal of public sector undertakings from the scope of Article 12 may not, therefore, totally remove them from writ jurisdiction.

Before we conclude, we consider it relevant to refer to the Law Commission's 126 Report, which emphasised that the Government and public sector undertakings must have their own litigation policy and strategy and they must be devised with a view to encouraging avoidance of litigation and settlement of disputes by alternative methods. Litigation is an unproductive investment both in time and money. Public sector undertaking and the Government have to conserve their resources and determine priorities of expenditure by a judicious approach so that unproductive litigation does not eat away a large chunk of the scarce resources, smothering, socially beneficial schemes for want of financial assistance. These observations were made as the Law Commission observed that there was a movement by the public sector undertakings to be freed from the yoke of the Constitution. The Law Commission further observed :—

"In fact, there is a recent movement by public sector undertakings to be freed from the yoke of the Constitution. At any rate, the object purpose and underlying philosophy towards setting up of public sector undertakings must mould its approach towards its employees, the consumers of its products and even other public sector undertakings. At any rate, it cannot afford to develop a litigious culture exhibited by private sector employers. And yet, numerous cases can be quoted where the public sector undertakings not only brought entirely frivolous disputes right up to the Supreme Court, but delayed the resolution of disputes by raising absolutely unsustainable, frivolous, preliminary objections. (1983) 4 SCC 214; *S.K. Verma vs. Mahesh Chandra and Others*; *Goa Sampling Employees Association vs. General Superintendence Co. of India* (1985) 2 SCC 353; *D.P. Maheshwari vs. Delhi Administration*; (1983) 4 SCC 293; *Workmen Employed by Hindustan Lever Ltd., vs. Hindustan Lever Ltd.*, (1984) 4 SCC 392."

### 5.22 Conclusion

It may now be convenient to state very briefly our conclusions regarding the proposed amendment of Article 12 of the Constitution :—

- (i) Such an amendment would not be a proper or necessary measure to be adopted for dealing with the difficulties that may be experienced by Public Sector Undertakings in the matter of award of contracts, rejection of tenders, service matters and the like, arising out of the present applicability of Article 12 to such Undertakings.

<sup>17</sup> Letter dated 13th February, 1989 and letter dated 7th February, 1989.

<sup>18</sup> Letter dated 6th February, 1989.

<sup>19</sup> Letter dated 9th March, 1989 and enclosures thereto.

<sup>20</sup> Letter dated 13th February, 1989.

<sup>21</sup> *Shri Anandi Mukta Sadguru S.M.V.S.J.M.S. Trust v. V.R. Ructani*, AIR 1989 SC 1607 followed in 96 CWN 799 and (1992) 2 MLJ 55.

- (ii) Having regard to the Preamble and total philosophy of the Constitution, even if such an amendment is made, some of the problems experienced by the public sector undertakings would still survive under the ordinary law.
- (iii) In particular, judicial intervention in the form of injunctions issued under the ordinary law cannot be ruled out, even after the suggested amendment.
- (iv) It is highly doubtful whether, in the light of the theory of non-amendability of the basic features of the Constitution as at present recognised, such an amendment will pass muster on the Constitutional level.

We recommend accordingly.

Sd/-  
(K.N. SINGH)  
*Chairman*

Sd/-  
(MOHD. SARDAR ALI KHAN)  
*Member*

Sd/-  
(D.N. SANDANSHIV)  
*Member*

Sd/-  
(P.M. BAKSHI)  
*Member (Part-Time)*

Sd/-  
(M. MARCUS)  
*Member (Part-Time)*

Sd/-  
(G.V.G. KRISHNAMURTY)  
*Member Secretary*

Dated, New Delhi, the 13th November, 1992