IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 6516 OF 2013

IN THE MATTEROF:

An application under Article 102 of the Constitution of the People's Republic of Bangladesh.

And

IN THE MATTER OF:

Mohammad Mahbubur Rahman

……Petitioner

Versus

Bangladesh, represented by the Secretary, Ministry of Post and Tele-Communications, Bangladesh Secretariat, Dhaka and others

……Respondents

Mr. Mahbub Shafique with
Mr. K.M. Hafizul Alam, Advocates

…….For the petitioner

Mr. Raisuddin Ahmed, Advocate

… …For the respondents

Heard on: 12.06.2014
Judgment on: 15.06.2014

Present:
Mr. Justice M. Moazzam Husain
And
Mr. Justice Md. Badruzzaman

M. Moazzam Husain, J

This rule *nisi* was issued calling in question an office order bearing Memo No. TBL/HR/Security/2007-2008/135 dated 15.04.2013 issued by Respondent No.4 (M.D., Teletalk Bangladesh Limited) terminating service of the petitioner.

Facts relevant for disposal of this rule are that the petitioner is a highly educated young man. He joined the Teletalk Bangladesh Ltd. (shortly, "the TBL") on 29.12.2009 as Deputy General Manager (Audit). Since joining the petitioner had been serving the Company with satisfaction of all concerned. All on a sudden the Respondent No.4 issued the impugned Memo dated 15.4.2013 terminating his service on the allegation that he supplied false information about his permanent residence while taking the job.

Having received the termination letter the petitioner came to know that the local SB office was requested to make verification about the permanent address of the petitioner. Pursuant to the request police made an inquiry and submitted report showing some discrepancies in the information. The petitioner addressed a letter the next day to the M.D., TBL, re-reaffirming the truth of the information given by him and requesting him to make a further inquiry into the matter. He addressed another letter

on the same day addressing the M.D. requesting him not to give effect to the termination letter till submission of the proposed second verification report. On 16.4.2013 all the directly recruited Managers and Deputy General Managers of TBL made a joint representation to the M.D., TBL, asking, amongst others, to withdraw the termination letter served upon this petitioner. The petitioner on his own filed an application to the Superintendent of Police, Narshingdi, requesting him to make further police verification into the truth of information about his permanent residence.

The Superintendent of Police, District Special Branch made an inquiry and submitted his report dated 23.4.2013 to the Special Police Super (VR), Dhaka showing, *inter alia*, that the permanent address of the petitioner was correct but he did not reside there. The Additional Inspector General of Police, Special Branch, Dhaka, forwarded the inquiry report to the M.D., TBL.

The petitioner thereafter on 25.4.2013 addressed a letter to the M.D., TBL requesting him to withdraw the termination letter in view of the report subsequently submitted by police on second verification. In view of the silence on the part of the authority the petitioner sent another letter on 13.6.2013 to the M.D. making a similar prayer. None of the moves was of any avail.

With the backdrop of facts the petitioner came up essentially with four contentions. First, the order was issued in violation of Rule 6 of the Discipline and Appeal Regulations of Teletalk Bangladesh Ltd. Second, the order is tainted with *mala fide* in that it was passed upon a secret verification made by police. Third, the petitioner did never furnish any false information about him far less his permanent address and the order was passed on a wrong report given by police. And finally, the order was passed in violation of natural justice in that no opportunity was given to the petitioner to explain his position nor was he given a copy of the police report. As for maintainability, the petitioner's case is that Teletalk Bangladesh Ltd is an instrumentality of the Government and the company is wholly dependent on the financial assistance of the Government. The corporate character of TBL is a sham and in fact the Government is operating behind the corporate veil.

The TBL as Respondent No.2 contested the Rule by filing affidavit and supplementary affidavits-in-opposition. The main attack of TBL seems to be on maintainability of the writ petition. The specific case of TBL is that the writ petition is not maintainable inasmuch as Teletalk is an ordinary public company as good as other private sector companies carrying on business as a mobile phone operator. Shares of TBL are held by certain individuals not by the Government. Nor is it dependent on the financial assistance of the Government. Government does have no control in the affairs of the company. The company is completely run by its Memorandum and Articles of Association. TBL is not an instrumentality or agency of the Government so as to be amenable to writ jurisdiction.

Subject as above, the other contentions, worth consideration, raised by TBL, are that the petitioner had an alternative and equally efficacious remedy in the service regulations of the company as the law gives the petitioner scope for filing review before the Board of Directors against any order of the Managing Director and that , even on merit writ does not lie in that there are two contradictory police reports on the same subject which cannot be resolved on affidavits.

As the question of maintainability is of overriding importance we chose to hear the Advocate for the contesting responded ie, the TBL first. Mr. Raisuddin Ahmed learned Advocate, appearing for TBL was at great pains to assail maintainability of the writ petition and strenuously argued that the writ petition is totally misconceived and not maintainable in that TBL is a limited liability company as good as other companies operating in the telecommunication sector. Government has nothing to do with the company nor is the company dependent on financial assistance of the Government as claimed. He sought to substantiate his point saying that- if government has to hold any share it must be issued in the name of the President of the Republic or the Government not in the names of individuals. He referred to us the instance of the Telephone Industries Corporation Ltd, latterly, Telephone Shilpa Sangstha (TSS) wherein majority shares of the enterprise were issued in the name of the President of the then Pakistan. Here in this case, he emphasized, the shares are held by some individuals, neither by the President nor by the Government. By reference to *MH Chowdhury v Tias Gas Transmission & Distribution Ltd* reported in 33 DLR (AD) 186:1981 BLD (AD) 61 and the Full Bench case, *Arif Sultam v DESA*, reported in 60 DLR 431 Mr. Ahmed submits that those cases are not applicable in view of the fact that corporate character of TBL is thoroughly maintained.

Mr. Mahbub Shafiq, learned Advocate, appearing for the petitioner submits by reference to different annexures that Teletalk is a company limited by shares 100% of which is held by the Government. And the company is wholly dependent on the financial assistance of the Government. He also traced the genesis of the company and stressed that the records relating to its birth and development will *ipso facto* suggest that Teletalk Bangladesh Ltd was born in the womb of the Government and is run and managed by the Government through its officials. It was never allowed to run by its Memorandum and Article of Association so as to be called an entity distinct from the Government. He sought to rely upon the Special Bench case ie, *Arif Sultan v DESA* (*supra*) and insisted that *Arif Sultan* is a major breakthrough in this area which has effectively settled the controversy leaving hardly or no scope to raise the question of maintainability of writ petition against government-owned companies of the kind. Mr. Mahbub sought to repel the question of alternative remedy saying that the petitioner has been terminated pursuant to a decision of the Board of Detectors. The appeal lay before the Board. That being so a move for appeal to be filed before the Board would mean nothing but a futile move from Caesar to Caesar.

As is apparently unsuited to the constitutional requirements writ petition against a company, in its ordinary parlance, is nearly impossible. But companies are often subjected to constitutional limitations in certain circumstances. This being an emerging jurisprudence can hardly be addressed without an overview of the concept of welfare state that furnished the background of the issue as well as some of the leading cases decided on point.

New dimensions in the state-activity beyond its traditional role essentially confined to law and order, security and defense, encompassing wider sphere of well-being of the citizens began to be visible in early twentieth century. The conception of government itself gradually changed. The administrative state of the modern times was taking shape with the growing feeling that it was the duty of the state to look after its citizens in their many different needs in day-to-day lives and provide remedies in basic socio-economic problems they are beset with. As the state diversified its role the concept of welfare state began to take root to continue into the twenty-first century. Now the engagements of a welfare state have extended as much as to cover the activity directed to providing food, shelter, employments, medical services, pension, transport, travel, leisure and so on. With the progress of science and technology the ever-expanding area of state activity are gradually extending to encompass newer and more technical and specialized fields often demanding expertise, special skill and professionalism and more suitable service conditions incidentally not compatible to bureaucratic grooming and traditions

In order to meet the exigency governments were seen to be engaged in commercial activity through corporatization, a process, in which government agencies and departments are often re-organized as autonomous or semi-autonomous corporate entities created by or under law sometimes with shares listed on the stock exchange which gave rise to the concept of government- owned companies, state-run corporations and the like. The basic characteristics of government owned corporations/companies are that they may be separate and autonomous from the government and tend to steer away from constitutional and public law limitations. This extended role of the governments being commensurate with the changing need of time is also constitutionally recognized in many countries including our own.

With the brief glance on historical background of the issue, let us now turn to some of the leading cases how the issue of maintainability of writ petition has been approached in Indian Jurisdiction:

In *RD Shetty v International Airport Authority of India*, (1979)3 SCC 489, the Supreme Court, while answering a question of the kind pointed out:

> *"The corporation acting as instrumentality or agency of the Government would obviously be subject to the same limitation in the field of constitutional and administrative law as the Government itself, though in the eye of law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain*

> *constitutional and public law limitations, it must follow, a fortiori, that Government acting through the instrumentality or agency of corporation should equally be subject to the same limitations."*

The court then proceeded to indicate certain tests to identify the character of the corporation:

> *"It may, therefore, be possible to say that where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character... a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as State action."*

In *Mysore Paper Mills Ltd v Mysore Paper Mills Officers' Association*, (2002) 2 SCC 167: AIR 2002 SC 609, Supreme Court was called upon to decide the question of maintainability of writ petition against a company registered under the Companies Act. It was held:

> *" The concept of instrumentality or agency of the Government is not to be confined to entities created under or which owes its origin to any particular statute or order but would really depend upon a combination of one or more of relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing force, if need be, piercing the corporate veil of the entity concerned."*

In *Central Inland Water Transport Corpn. v Brojo Nath Ganguly*, (1986) 3 SCC 156: AIR 1986 SC 1571, Supreme Court was called upon to decide whether Central Inland Water Transport Corpn, a company incorporated under the Companies Act can be said to be "State" within the meaning of Article 12. In giving the answer in the positive Supreme Court took into considerations the following factors: (i) the Corporation was wholly owned and entirely financed by three Governments (ii) It was completely under control of the Central Government and was managed by the Chairman and Board of directors appointed by the Central Government and recoverable by it (iii)the activity carries on by the Corporation were of great importance to public interest, concern and welfare and found that it was the Central Government operating behind the corporate veil.

In *MC Mehta v Union of India*, (1987) 1 SCC 395, in response to a similar question Supreme Court took into consideration several factors ie, industrial policy of the government, public interest importance of the activities carried by the private corporation, extensive financial control by the government and said: " The question is whether these factors are cumulatively sufficient to bring Shriram within the ambit of Article 12. Prima facie it is arguable that when the State's power as economic agent, economic entrepreneur and allocator of economic benefits is subject to limitations of fundamental rights, why should a private corporation under the functional control of the State engaged in an activity which is hazardous to the health and safety of the community and is imbued with public interest ... run under the State's industrial policy should not be subject to same limitation."

The case of *Som Prakash Rekhi v Union of India*, [1981] 1 SCC 449, arose out of a claim of provident fund etc payable to the petitioner by the Bharat petroleum Corporation. The petition was resisted on the ground that the undertaking was vested in a company registered under Companies Act and question of writ against a private company could not arise. Ayre, J brushed aside the contention and held:

> *"Any person's employment, entertainment, travel, rest, and leisure, hospital facility and funeral services may be controlled by the State. And if all these enterprises are executed through Government companies, bureaus, societies, councils, institutes and homes, the citizen may forfeit his fundamental freedoms vis-à-vis these strange beings which are Government in fact but corporate in form. If only fundamental rights are forbidden access to corporation, companied bureaus, institutes, councils and kindred bodies which act as agencies of the administration, there may be break down in the rule of law and Constitutional order in a large sector of Governmental activity carried on under the guise of 'jural persons'. It may pave the way for new tyranny by arbitrary administration operated from behind by the Government..."*

In *Ajay Hasia v Khalid Mujib*, (1981) 1 SCC 722: AIR 1981 SC 487, Bhagwati, J (as his Lordship then was) took a similar view and held:

> *" Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constructional law must seek the substance not the form... Today with increasing assumption by the Government of commercial ventures and economic projects, the corporation has become an effective legal contrivance in the hands of the government for carrying out its activities for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with professional skills and on business principles and it is blissfully free from departmental rigidity, slow-motion procedure and hierarchy of officers... In such cases the true owner is the state, the real operator is the State, and the effective controller is the State and accountability of its action to the community and to the Parliament is of the State"*

Speaking for the Court his Lordship further observed:

> *" Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to same limitations in the field of constitutional law as the Government itself, though in the eye of law it would be distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a fortiorari that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitation... It must be remembered that the Fundamental rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by narrow and constricted judicial interpretations."*

In the said judgment it was recognized that mantle of corporation may be adopted in order to free the government from the inevitable constraints of red-tapism and slow-motion but at the same time it is emphasized that the government must not be allowed to take recourse to corporatization as a device to frustrate the fundamental rights guaranteed by the constitution. The court, however, formulated six criteria upon

which government-linked corporations or companies may be tested in order to discern the truth behind the corporate veil. The criteria are:

1. If the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
2. Where the financial assistance of the State is as much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
3. Whether the corporation enjoys monopoly status which is State enforced or State protected.
4. Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
5. If the functions of the corporation are of public importance and closely related to governmental functions, it would be relevant factor in classifying the corporation as an instrumentality or agency of the Government.
6. If a department of the Government is transferred to a corporation, it would be strong factor supporting the inference that the corporation is an instrumentality or agency of Government.

In a more recent case, *Zee Telefilms Ltd v Union of India* reported in (2005) 4 SCC 649 & AIR 2005 SC 2677, the Constitution Bench by a majority of 3:2 took comparatively a restrictive view and said that the State is today distancing itself from commercial activities and concentrating on governance rather than on business. There is no need to expand the scope of Article 12 of the Constitution as the situation prevailing in 1975 does no more exist. On the contrary, the minority maintained the ongoing pro-active trend and spoke in the following language:

> *"With the opening up of economy and globalization, more and more Governmental functions are being performed and allowed to be performed by private bodies. When the functions of a body are identifiable with the State functions, they would be State actors only in relation thereto."*

In our jurisdiction successively two important cases arose at the juncture of 70's, and 80's namely, New *Dhaka Industries Ltd v Qumrul Huda*, (1979) 31 DLR (AD) 234 and *MH Chowdhury v Tias Gas Transmission & Distribution Ltd* reported in 33 DLR (AD) 186 originally out of writ petitions filed against dismissal/termination of service from private limited companies nationalized under PO 27 of 1972. In *New Dhaka Industries* question was raised as to whether an employee dismissed from his service in a private company can challenge the order of dismissal in writ jurisdiction. Before the High Court Division the maintainability point raised by the company failed to gain ground. Appellate Division having examined the impact of nationalization upon the company found that nationalization, although conferred some controlling power on the Jute Mills Corporation, did not destroy the corporate character of the company and, therefore, the appellant being an employee of the company his service was governed by the ordinary law of master and servant. In coming to its decision Appellate Division observed:

> *"[T]he effect of nationalization on corporate character of the company is not uniform, and it depends on the nature of the legislation for which it was designed. In some nationalization scheme, enterprises may operate through the existing companies keeping their types in*

> *existence... and though the nationalized companies may have their particular structural differences, they assume basically the same form of being a body corporate with perpetual succession and a common seal and power to hold property... It, therefore, seems clear that the general law of the corporation will govern them except in so far as this is expressly or impliedly modified and much, therefore, depends on the language and the purpose of the legislation under which the enterprises are nationalized*."

In *MH Chowdhury* (the oft-quoted case), the question arose whether a company 100% or bulk of whose shares are held by the Government placed in a statutory corporation by operation of law retained the corporate character of a limited company so as to be called an autonomous body.

Fact was that, in October, 1968 the appellant was employed as Internal Auditor in Titas Gas Transmission & Distribution Company Ltd. The company terminated his service by a notice issued on June 22, 1971. After emergence of Bangladesh he was appointed as Administrative Manager in the company which was placed under Bangladesh Minerals, Oil & Gas Corporation under nationalization measures taken pursuant to PO 27 of 1972. Respondent No.1 (GM, Titas Gas Company) by his order dated May 24, 1979 terminated his service as per terms of contract/letter of appointment. High Court Division discharged the rule holding, *inter alia*, that no privilege of natural justice was available to him as his service was terminated as per terms of contract of service which he entered in 1968. And his appointment in 1972 as Administrative Manager of the company was not fresh appointment but continuation of the earlier appointment testified by the fact that he accepted the seniority from 1966.

The appellant challenged the order of termination on the ground of lack of authority of Respondent No.1 to terminate his service; he was no longer an employee of the company but an employee of the corporation. He denied that there was any contract with Respondent No.1 under which his service might be terminated; the order of termination was *mala fide* as passed in violation of natural justice. The appellant contended that the company became a public enterprise within the meaning of the terms as provided in Comptroller and Auditor General (Auditorial Functions) Amendment Act, 1975. As a public enterprise its accounts are audited by the Comptroller and Auditor General of Bangladesh. It gets allocation from of funds from development projects of the Government and its annual development programme has to be approved by the Planning Commission. Due to these measures, both legislative and executive, the status of the company changed from that of an ordinary limited company to that of public enterprise which is owned by the Government and controlled by the corporation.

Having considered the effect of the relevant provisions of series of enactments having bearing on PO No. 27 of 1972 Appellate Division held:

> "After considering the various provisions of law contained in the Bangladesh *Abandoned Property (Control, Management & Disposal) Order, 1972 (PO 16 of 1972) and Bangladesh Industrial Enterprises*

> *(Nationalization) Order, 1972 (PO 27 of 1972) under which the enterprise was first taken over by the Government as abandoned property and then nationalized and placed under the corporation and the enactments relating to the creation of the Corporation , its power and functions and the enactments which refer to and deal with public or nationalized enterprise, it would be difficult to hold that the company or enterprise , namely, Titas Gas Transmission & Distribution Co. Ltd. maintained corporate character of a limited company after it was taken over by the Government as a nationalized Enterprise and placed under the Corporation. From the definition of public enterprise or nationalized enterprise as appears from the abovementioned enactments, the Titas Gas Transmission & Distribution Co. Ltd. can be viewed both as a nationalized enterprise and a public enterprise. Apart from the legal provisions, the company or the enterprise is, in fact entirely controlled by the Government. There is nothing in its memorandum or articles of association to show that it maintained its autonomous character or separateness from the controlling hand of the Corporation. No private individual has any share in it, nor does the memorandum of association or articles of association provide for participation in its shares by members of general public. Its Board of Directors are entirely manned by and composed of Government officers. It would be seen that except for the purpose of identification of the enterprise or the company vis-a-vis other such nationalized company or enterprise which have been placed under Corporation, it has no distinct will of its own as against Corporation. Whatever separateness may be claimed for or on behalf of any enterprise or company which has been taken over by the Government under the Nationalization Order it has to be understood in this context. If the separateness or, in other words, its autonomy from the Corporation is claimed, it must be shown from the recognition of such autonomy in its constitution, after whatever alterations have been made in it, either by the Government or the Corporation itself. The degree or extent of autonomy may appear also from the actual functioning of such company or such enterprise…If, in spite of a company or an enterprise being a public enterprise or a nationalized enterprise it is allowed by the Corporation to manage its affairs according to its constitution, that is, its Memorandum of Association and Articles of Association or agreement or deed under which it was originally created, it may be said that such company or enterprise has maintained its corporate character, if that is not so and its functioning is seen to be controlled by the Corporation, whatever independent entity it might have before its becoming a nationalized enterprise or company is submerged into that of the Corporation.*

Thus the company being held to have lost its corporate entity into the government-owned corporation was found to be instrumentality of the Government and thus amenable to writ jurisdiction.

The two leading cases of the Appellate Division, regardless of the ultimate result, were decided on the same legislative background and on similar jurisprudential approach. *MH Chowdhury* being the later and more suited to the present context may conveniently be followed for representing the principle. In *MH Chowdhury* the *ratio* decided is that -writ petition will not lie even against a nationalized company placed, by operation of law, under a statutory corporation, if the corporate character of the company is maintained ie, the company is allowed to run by its Memorandum and Articles of Association. While holding that Titas Gas Company is amenable to writ jurisdiction the Court took into consideration, amongst others, the degree and extent of control exerted by the Corporation upon *Titas Gas*; the extent of functional autonomy

Titas Gas did enjoy; absence of public participation in its shares; dominant role of Government officials in the Board of Directors and absence of its independent will distinct from the Corporation.

Newer cases came up before the High Court Division with peculiar backgrounds demanding wider and more activist search directed to unveiling government pursuing commercial venture in corporate clothings to the deprivation of fundamental rights of citizens or that the company is engaged in activity of public nature affecting larger sections of people. Down the line came up the cases of Conforce Ltd v Titas Gas Transmission & Distribution Ltd. reported in 42 DLR 33; *Bangladesh Consumers' Supply Company Ltd v Registrar, Joint Stock Company*, 46 DLR 552; *Farzana Moazzem v Security & Exchange Commission* reported in 54 DLR 66; *Zakir Hossain Munshi v Bangladesh* reported in 55 DLR 130: 22 BLD 483 and lastly the Full Bench case of *Arif Sultan v DESA* reported in 60 DLR 432.

In *Conforce Ltd*. disconnection of gas line by Titas Gas Transmission & Distribution Co. Ltd. was challenged as arbitrary and violative of the terms of contract. Ground of maintainability was as usually raised. The contention was that the company was an ordinary limited company registered under the Companies Act against which writ cannot lie. More so, what is challenged is an alleged violation of contractual obligation which is also not susceptible to writ jurisdiction. This time round *Titas Gas Company* was viewed from a different angle and was found amenable to writ jurisdiction as it was engaged in transmission and distribution of the property of the Republic ie, gaseous substance, under the direct control of a statutory corporation. Since the company was authorized to exercise governmental power the contract executed by it was found not to be an ordinary contract; it was a contract made on behalf of the state in its sovereign capacity.

The case of *Consumer's Supply Company*, however, arose in a different context, ie, out of a winding up petition made under Sections 162 and 166 of the Companies Act, 1913. The opposite parties resisted the petition on maintainability ground stating, *inter alia,* that the government is the 100% share holder of the Company. In spite of incorporation of the petitioner as a limited company under the Companies Act the petitioner retains its character as a public sector enterprise as contemplated under Public Corporation (Management & Co-ordination) Ordinance, 1986(Ordinance No.48 of 1986), therefore, Section 162 of the Companies Act has no manner of application in this case. The Government with *mala fide* motive to defraud the creditors brought the petition. High Court Division while maintaining the petition observed–'Merely because 100% share of the Company is held by the Government and the Company being a 'Public Corporation' within the meaning of Section 2(d) of the Ordinance and included in the schedule thereof it cannot be said that the same is a department or organ of the government so as to frustrate the winding up petition.

In *Farzana Moazzem* validity of a letter issued by the Chief Executive Officer of the Dhaka Stock Exchange was challenged by an investor with ancillary directions sought against the respondents to act as required by Reg.7 of the Settlement of the Stock Exchange Transactions Regulations, 1998 in respect of share-transactions made by the petitioner. Question of maintainability came up. A Division Bench of this Division having considered the nature of control of the Security and Exchange Commission on the Dhaka Stock Exchange in the light of connected laws particularly the Securities and Exchange Ordinance, 1969, found the writ petition maintainable and held:

> *"On careful examination of the various provisions of the aforesaid laws, particularly the sections referred to above from the Securities and Exchange ordinance, 1969, we are persuaded to hold that the DSE has been performing its duties in carrying out its object and business as an instrumentality or a subordinate functionary of the SEC, a local authority, which in fact has also stepped into the shoes of the Government in respect of some matters provided for in the erstwhile Capital Issue (Continuance of Control) Act, 1947(Act XXIX of 1947). DSE is thus amenable to the jurisdiction of the High Court Division under Article 102 of the Constitution."*

In *Zakir Hossain Munshi*, the petitioner, a subscriber of the Grameen Phone line, challenged the imposition and realization of royalty and license fees every year from him as a subscriber and sought a direction to refund the money so realized from him. Question of maintainability was seriously raised. In this case a Division Bench of this Division took an apparently activist approach and found the writ petition maintainable. In so holding the court reasoned that establishing, maintaining and working telegraph is the exclusive privilege of the Government as per section 4 of the Telegraph Act, 1885. The same legal provision empowers the Government to grant license to any person so to do within any part of Bangladesh. Grameen Phone, under license from the Government, has installed and placed in operation multi-station radio system of digital mobile cellular telephone service all over Bangladesh in order to provide cellular mobile phone service to the subscribers. Grameen Phone as a licensee under the Government, has been providing cellular phone service on behalf of the government, therefore, the phone company is in fact performing governmental and sovereign functions, that is, the exclusive functions of the Government under section 4 of the Telegraph Act.

It may be noted that this case has been decided on a new proposition ie, companies performing governmental functions under license must be subject to writ jurisdiction irrespective of corporate character maintained.

Lastly, in the Full Bench case (*Arif Sultan v DESA*) the Court was called upon to decide two questions: (1) whether lifting the veil would be necessary in a case where the impugned order is issued by a company limited by shares held by the Government, and (2) whether the company entire share of which is held by the Government comes within the meaning of "local authority" so as to maintain writ petition against the same.

The case arose out an order of termination of service of the petitioner issued by the respondent company, namely, Dhaka Electric Supply Company Ltd. (DESCO). The Court proceeded to answer the questions upon examination of series of cases decided in our as well as in Indian jurisdiction having bearing on the issue including most of the cases referred to above. The two reference questions were answered in the positive and DESCO was finally identified as an instrumentality of the Government and held to be open to writ jurisdiction. Main plank of arguments addressed at the Bar leaned in favour of a liberal approach in matters of interference in such cases. The Full Bench, however, remained wedded to the literal meaning of the principles decided by the Appellate Division keeping in view the changing need of time, implications of welfare state and compulsions of the modern day governments to pursue commercial ventures through corporate bodies. To quote the exact language of the Court:

> "In *this age of survival of the fittest, the company must have the option to fire its employees in order to hire the most skilled ones. With the advent of the welfare state , it began to be increasingly felt that the framework of civil service was not sufficient to handle the new tasks which are often of specialized and highly technical character. The inadequacy of civil service to deal with the new problems came to be realized and it became necessary to form companies incorporated under the Companies Act by the Government. But it is important to note that the company must be allowed to determine its own fate according to Memorandum and Articles of Associations after its incorporation and that so long that is not allowed the company is deemed to be an instrumentality or agency of the Government or local authority. The interest of the Government will be taken care of by its nominated directors and not by the Government itself."*

The Court then proceeded to lay down a five-fold test to determine whether a company is an instrumentality or agency of the Government. The five-critera test put in place appears not to be meant as exhaustive rather in the sense that the cumulative effect assessed on the criteria should indicate the answer. The conditions enumerated are as follows:

1. *If the entire share capital of the company is held by the Government, it will go a long way towards indicating that the company is an instrumentality or agency of the Government.*
2. *Existence of deep and pervasive control of the Government.*
3. *The true rationale in setting up the company.*
4. *The company is fully dependent on the financial assistance of the Government.*
5. *The company is not run by the Memorandum and Articles of Association.*

The overview of cases especially of Indian jurisdiction referred to above suggests that the Supreme Court took a more liberal view in matters of interference and came down heavily in the protection of fundamental rights of citizens as something not to be bartered away with governmental compulsion of corporatization and subjected the corporations/companies to constitutional limitations if found to be identifiable with government agency or instrumentality irrespective of corporate character maintained. View taken in our jurisdiction, *albeit* not directly focused on fundamental rights

concern, appears to be more tilted to a balance between State-compulsion for corporatization and fundamental rights entitlements of citizens.

Looking back to Teletalk Bangladesh Limited, it appears that TBL was registered in 2004 as a public company limited by shares formed *albeit* apparently for commercial purposes essentially imbued with public interest objectives. Several documents connected to the company are put on records on behalf of the petitioner, namely, copies of Memorandum and Articles of Association; a copy of certificate of incorporation, a copy of certificate for commencement of business; a copy of Annual Report of the company for the year 2009-2010; a notice dated 29.12.2004 issued by the Secretary, Ministry of Posts & Telecommunications as Chairman Teletalk Bangladesh Ltd inviting the first meeting of the Board of Directors; minutes of the first meeting of the Board of Directors held on 30.12. 2004; a copy of notice dated 01.6.2005 inviting statutory meeting of the company; minutes of the statutory meeting of the company held on 22.6.2005 and an overview of the Board of Directors retrieved from the Company's official website.

The constitution of the company ie, Memorandum and Articles of Association on the face of them suggest that there are seven high officials of the Government who subscribed their names to the Memorandum and Articles, namely, 1) Secretary, Ministry of Posts & Telecommunication; 2) one Joint Secretary, of the same Ministry; 3) one Joint Secretary, Ministry of Commerce; 4) one Joint Secretary, Ministry of Finance; 5) one Joint Secretary, Ministry of Science & ICT; 6) Chairman, Bangladesh Telegraph & Telephone Board and 7) Project Director, Mobile Phone Project. As per the company's Articles they, by virtue of being the subscribers, are the Directors of the company. The company is registered with an authorized capital of Tk. 2000, 00, 00,000.00 (Two thousand crore) divided into 2, 00, 00,000 (Two crore) shares of Tk. 1000/- each. The Directors took two shares each.

The Articles provide that till the time the new Directors are appointed, the subscribers shall remain as Directors of the company. The office of the Director shall be *ipso facto* vacated if he is transferred, released or retired from the post by virtue of which he is nominated or appointed to hold the position of Director of the company. The Secretary of the Ministry of Post & Telecommunications, Government of Bangladesh will be the first Chairman of the company. The Managing Director of the company shall be nominated by the Government and approved and appointed by the Board of Directors. Board's power to create posts and make appointments is also subjected to the power of the Government so to do in respect of the company. Besides the specific cases of nomination/appointments, all the members of the Board are nominated by the Government. The position is borne out by the Annual Report of the company (2009-10) in the following words: 'The Board of Directors comprises of eleven members, all being nominated by the Government of Bangladesh'.

As an enormous corporate venture aimed at providing cellular mobile phone services side by side with other mobile phone companies now in place, TBL needed *a priori* huge initial capital and infrastructure in order to commence and continue its business, more so, in a competitive market. No indication is given in the affidavit how the company went on financing such a huge corporate venture and commenced trading before raising minimal share capital and being possessed of appropriate level of assets. Curiously, the company, although did not disown the documents placed on records, chose not to explain them. Rather tried to meet them by the patent words: TBL is an ordinary public company as good as other companies operating in private sector and that it is not dependent on the financial assistance of the Government.

The Annual Report for the year 2009-10 of TBL and other connected documents placed on records by the petitioner, however, seek to answer the question in a way. Relevant portions of the Report are selectively quoted below:

> *'In Bangladesh the mobile telephony was opened to private sector for more than a decade ago and during the period four mobile operators came up to serve the people in this sector. But they could not fulfill the public demand as anticipated... Under the circumstances, the idea of establishing a mobile telephone project in the public sector was conceived...The ECNEC of the Government of People's Republic of Bangladesh decided to form a separate public limited company for implementation and operation of the project. Then the Bangladesh Telephone & Telegraph Board having longest experience of serving in the telecom sector in Bangladesh undertook initiative to form the desired company in public sector. In view of the fact that formation of a public company involves considerable time and various relevant formalities,* it was decided that BTTB should implement the project and operation thereof would be carried out by the desired company. *Subsequently the assets out of this process would be taken over by the desired company to be formed. With the view described above, Teletalk Bangladesh Limited being the only government-sponsored mobile telephone company in the country was incorporated on 26 December, 2004 as a public limited company under the Companies Act, 1994.'*
>
> *'Since the company', the report continues, 'inherited the BTTB project the relevant equipments and infrastructure necessarily were in the name of the erstwhile BTTB. Upon approval of the Government, the company by executing a vendor's agreement with the Ministry of Posts & Telecommunications has acquired all the equipments and infrastructures thereby transferring the title of the relevant assets in its own name. In consideration 6,438,639 fully paid ordinary shares of Tk. 1000/-each have been issued in the name of the Ministry of Posts & Telecommunications... After acquiring the assets and upon increasing the paid up capital by that extent, as the Government decision, the Board of Directors of the Company has approved to go for IPO @ 40% of TBL paid up capital in the capital market. Such decision of the Board has been communicated with the Ministry of Posts & Telecommunications for obtaining further guideline.' (Emphasis added)*

The Report paraphrased, bears the plain meaning that TBL is the child of an idea conceived at the Government level that a mobile telephone project need be taken up to ensure more competitive and better service to the people. The idea led to the decision taken in the meeting of Executive Committee of National Economic Council (ECNEC) that a company was to be formed for operation of the project. Bangladesh Telegraph &

Telephone Board (BTTB) was entrusted with the responsibility to devise and form the company primarily to see the operational side of the project. The assets needed in the process were to be taken over by the company. TBL accordingly came into being as the only government-sponsored company and started operation on the existing equipments and infrastructures of BTTB. Thereafter the BTTB-equipments and infrastructures taken over by TBL were formally transferred to TBL by a vendor's agreement made with the Ministry of Post & Telecommunications. In consideration 6,438,639 fully paid ordinary shares of Tk.1000/each were issued in the name of the Ministry. Thereafter, pursuant to a decision of the Government, the company decided to go for initial offer of its shares to the investors in the capital market and communicated the decision to the Ministry of Posts & Telecommunications.

The Report read with the affidavit sworn by TBL leaves us with no doubt that TBL was born out of the flesh and blood of the Government. It still feeds on the staff, equipments and infrastructures of BTTB, a statutory public authority. It owes its origin in the idea of the Government to launch a mobile phone project in public sector and ECNEC decision to form a company to operate the project. TBL has, so far, not made any formal offer of its shares to the public so as to raise its own capital. All the facts taken together necessarily indicate that, TBL, for all practical purposes, is an instrumentality of the Government working in corporate costume for operating a mobile phone project of the Government entirely depending on the financial assistance of the Government.

On the management side, Government's control in company affairs has been deep-seated from very inception continued till date. The original Board of Directors, as mentioned earlier, comprised of seven members all of whom were high officials of the Government. The present Board of Directors comprises of eleven members, eight from top, are public functionaries. The Secretary, Ministry of Posts & Telecommunications is the *ex officio* Charmin of the company's Board. All the Directors including the Managing Director, as suggested by the Articles and the Report, are nominated by the Government and holding office by virtue of their respective offices in the Republic. Their appointments as Directors are made variable with the variation of their services in the Republic. The Board's power to create posts and appointment of company employees is subjected to the decision of the Government. As transpired from the minutes of the first meeting that TBL did not take the expensive operating license from BTRC as is done by private sector companies, and is carrying on its business upon the license that was held by BTTB just by changing name through the Bangladesh Telecommunications Regulatory Commission (BTRC). This is clearly indicative of the fact that TBL has been enjoying a kind of monopoly as against others under the direct protection of the Government. More importantly, the company does have no independent will of its own distinct from the Government and is incapable of taking at least any major decision without prior approval of the Government which is apparently manifested (as transpired from Article & Report) in three examples, namely, the

subordination of the Board's power to create posts and make appointments for the company to the power of the Government; its lack of authority to make public offer of its shares without prior approval of the Government and its practice of keeping the Ministry informed about its official transactions.

Seen in the light of compulsion of modern governments to be engaged in multiplicity of functions keeping in view the wellbeing of the citizens, we see nothing unfair on the part of the Government to corporatize its functions demanding special knowledge, skill, and professionalism for more efficient and fruitful outcome. But by no consideration government can be allowed to use corporate façade as a device to impair, emasculate or frustrate fundamental rights of citizens guaranteed by the Constitution. If the control of the Government in the affairs of the company is so deep and pervasive as to destroy the corporate character of the company and the capability of the company of being run by its Memorandum and Articles of Association proves an impossibility, the company is a sham or façade no more than an instrumentality of the Government. It must suffer the same constitutional and public law limitations as the government does.

Here in this case it is difficult to identify TBL as an identity distinct from the Government. The huge venture is still entirely dependent on the public exchequer for its finance. Its Board is predominantly manned by the public functionaries who hold the position *ex officio* as servants of the Republic. All the Directors are nominated by the Government. The Board is substantially dependent on the Government for every major policy decision of the company. Exactly as is done by a government department, TBL acts under direction and supervision of the Ministry and keep the Ministry informed at least about important official transactions. Government control on TBL management and policy is as unusually deep and pervasive as to admit of no separate corporate autonomy or character of its own. It has no independent will distinct from the Government. All the indicators available on records lead to the irresistible conclusion that TBL as a company is nothing but a sham or façade. It is only identifiable as an instrumentality or agency of the Government. It follows that TBL must be subjected to same constitutional and public law limitation as the Government is.

The contention of Mr. Ahmed that a company to be an instrumentality of the government shares must be issued in the name of the President or the Government cuts no ice as is totally watered down by the jurisprudence emerging over the decades through judicial expositions. His contention that the persons holding shares of the company are mere 'individuals' nothing to do with the Government is utterly unacceptable and stands in bold contrast with the company constitution itself.

For the reasons stated above we find no substance in the argument of Mr. Ahmed addressed on maintainability. The writ petition against Respondent No.2 ie, Teletalk Bangladesh Ltd. is found to be maintainable.

Turning to the case of the petitioner, he was removed from service on the allegation that he supplied wrong information about his permanent address while getting his job in TBL. The petitioner after completing his Master's degree and other specialized courses joined TBL as Deputy General Manager (Audit) in December, 2009. At the time he was served with termination letter he completed three and half years in service. It appears that the termination letter followed a police verification report wherein permanent address of the petitioner was found inconsistent and none from the locality could identify the petitioner as one belonging to the address. Nothing is alleged about the quality of service rendered by the petitioner over these three and half years. Let it be mentioned that there was a second verification made by police in which the information given by the petitioner was found correct.

The police verification upon which the impugned order was issued was admittedly made in secret as is usually done. The management of TBL took the matter very seriously and decided to award him the highest punishment. Accordingly the termination letter was issued by the Managing Director on April 15, 2013 pursuant to a decision of Board of Directors, taking recourse to Clause 4(b) of the appointment letter. Admittedly no show cause notice was issued asking the petitioner to explain his position, before termination of his service. The relevant portion of the termination letter addressed to the petitioner reads as follows:

> *"Your employment with Teletalk Bangladesh Limited (TBL) is hereby terminated under clause no. 4(b) of your appointment letter for providing false information which has been intimated by police through their verification report.*
> *2) The decision of termination of your employment with TBL for providing aforesaid false information was passed in the resolution of 109th meeting of Board of Directors (BoD) of TBL held on March, 16, 2013.*
> *3) ……. ……. ……. ……. ……. …….*
> *4) ……. ……. ……. ……. ……. …."*

The termination letter shows that the petitioner's service was terminated attracting Clause 4(b) of the appointment letter. Clause 4 of the appointment letter enumerates four grounds for termination, two of which are related to termination for misconduct and two others including Clause 4(b) are related to termination *simpliciter* as a matter of law not for any fault.

Since Clause 4(b) of the appointment letter provides for termination of service without notice for no fault of the employee, provision of the clause cannot be resorted to where an employee is sought to be removed for misconduct. Charge of misconduct itself implies stigma on the service career which is followed by punishment, if proved. No employee, therefore, can be punished for misconduct without a proceedings initiated and prior notice given allowing him reasonable opportunity to explain his position.

In the instant case the allegation consists in 'providing false information about the petitioner's permanent address which, if true, is a kind of 'misconduct' as

contemplated under law. And the petitioner was removed straightaway on the charge by resort to the 'No-show cause clause' without initiating any proceedings or giving him an opportunity to explain his position which is not only illegal and a fraud on the law but also unjust, arbitrary and oppressive. This apart, the termination order issued forthwith merely on a verification report, that too, on a trifling subject like inconsistency in home address (later found correct) besides being *mala fide* is utterly disproportionate and not acceptable in the eye of law.

We are not persuaded by the submission of Mr. Ahmed, that the petitioner had equally efficacious remedy in departmental appeal or in civil suit in that the suit cannot be equally efficacious in any view of the matter and departmental appeal was to be preferred to the Board of Directors which took the decision of termination meaning thereby that an appeal was to be made from Caesar to Caesar as rightly pointed out by Mr. Mahbub. The contention that disputed facts presented by two contradictory police reports cannot be decided in writ petition is of no anvil as the facts do have no bearing upon merit of this Rule.

For what we have stated above, we find merit in this Rule. Accordingly, this Rule is made absolute. The impugned order of termination from service is declared to have been issued without any lawful authority and is of no legal effect. The Respondents are directed to reinstate the petitioner in his service with seniority and to pay all arrear salary and other service benefits within one month from receipt of this judgment.

There shall, however, be no order as to cost.

Communicate copies of this judgment at once.

Md. Badruzzaman, J

I agree