

2011 (2) GLR 1197

GUJARAT HIGH COURT

Hon'ble Judges: Sudhansu Jyoti Mukhopadhaya, Akil Kureshi and Anant S. Dave JJ.

Rambhai Ishwarbhai Patel Versus Gujarat State Fertilisers And Chemicals Limited

SPECIAL CIVIL APPLICATION No. 6677 of 2009 ;
SPECIAL CIVIL APPLICATION No. 8101 of 2009 ;
SPECIAL CIVIL APPLICATION No. 4263 of 2009 ; *J.Date :- MARCH 14, 2011

- [COMPANIES ACT, 1956](#) Section - [617](#)
- [CONSTITUTION OF INDIA](#) Article - [12](#), [226](#)

Companies Act, 1956 - S. 617 - Constitution of India - Art. 12, 226 - whether Gujarat State and Chemicals Ltd an instrumentality of the "State" within meaning of Art. 12 of Constitution - considering the shareholding pattern etc. Government has no rule in administration functioning of the company - whether petition under Art. 226 maintainable against the company - held, the corporation not instrumentality of "State" - no writ petition maintainable against the company.

Companies Act, 1956 - S. 617 - Constitution of India - Art. 12, 226 - whether Gujarat Narmada Valley Fertilizers and Chemicals Ltd an instrumentality of the "State" within meaning of Art. 12 of Constitution - whether writ petition maintainable - held, the said company not under deep and pervasive administrative functional and financial control of Government nor State Government has any share in the company, thus the said company not instrumentality of "State" within Art. 12 of Constitution - no writ petition maintainable against the said company - petition dismissed.

Imp.Para: [[10](#)] [[12](#)] [[20](#)] [[21](#)] [[22](#)]

Cases Referred To :

1. Ajay Hasia V/s. Khalid Mujib, AIR 1981 SC 487
2. [Gujarat State Fertilizers Company Ltd. V/s. Association Of Officers, G.S.F.C., 1995 2 GLH 179 : 1994 GLHEL HC 204080](#)

3. L.I.C. V/s. Escorts Ltd., AIR 1986 SC 1370
4. R.D. Shetty V/s. The International Airport Authority Of India, AIR 1979 SC 1628
5. Rajasthan State Electricity Board, Jaipur V/s. Mohan Lal, AIR 1967 SC 1857
6. Somprakash V/s. Union Of India, AIR 1981 SC 212
7. Tekraj Vasandi Alia, K.L. Basandhi V/s. Union Of India, AIR 1988 SC 469

Cited in :

1. (Relied on) :- [Somji Karamsinh Patel Vs. District Collector And District Magistrate, Kutchh, 2020 \(3\) AIJ\(DG\) 37 : 2020 JX\(Guj\) 420 : 2020 AIJEL HC 242230](#)
2. (Referred To) :- [Atul Kantilal Shah Vs. Jyoti Limited And 1, 2014 JX\(Guj\) 846 : 2014 AIJEL HC 231854](#)

Equivalent Citation(s):

2011 (2) GLR 1197 : AIR 2011 Guj 177

JUDGMENT :-

S.J.MUKHOPADHAYA, J.

1 The only question that arises in these cases is whether 'Gujarat State Fertilizers and Chemicals Limited' and 'Gujarat Narmada Valley Fertilizers Company Limited' are 'State' within the meaning of Article 12 of the Constitution of India.

A Division Bench of this Court in Gujarat State Fertilizers Company Ltd. Vs. Association of Officers, G.S.F.C. reported in 1995(2) GLH 179 answered the question in negative, and held that Gujarat State Fertilizers Company Ltd. is not a 'State' within the meaning of Article 12 and not performing any public duty or function. Learned counsel for the parties brought to the notice of the Court a Government Circular dated 14th March 2008 bringing the aforesaid Companies within the ambit of State Public Sector Undertakings. Therefore, the question has been referred to the Larger Bench to determine whether the Division Bench in Gujarat State Fertilizers Company Ltd. Vs. Association of Officers, G.S.F.C. reported in 1995(2) GLH 179 laid down a correct law or not.

2 For determining the issue, it is relevant to notice certain facts, majority of which were noticed by the Division Bench in the earlier judgment. Gujarat State Fertilizers and Chemicals Limited (hereinafter referred to as 'G.S.F.C.' for short) was created as a Company under the Companies Act, 1956 (hereinafter referred to as 'the Companies Act' for short). When the earlier case was

decided, the Court noticed that as on 16th May 1985, following percentage of shares were available with different shareholders:

- (i) The Governor of Gujarat 49.2%
- (ii) IDBI, LIC and other financial institutions 29.17%
- (iii) Nationalised Banks 00.87%
- (iv) Indian and Foreign Companies 02.51%
- (v) Individual and other Non Residents and Cooperative Banks and Societies 18.44%

3 Subsequently, as on 4th July 1992, the shareholding of the Governor of Gujarat had come down and it was as follows:-

- (i) The Governor of Gujarat 00.23%
- (ii) Gujarat State Investment Corporation Ltd. 41.70%
- (iii) Gujarat Industrial Investment Corporation 00.10%
- (iv) Financial Institutions 38.68%
- (v) Banks 00.27%
- (vi) Indian and Foreign Companies 01.62%
- (vii) Individual and others 19.22%

In terms of numbers, there are approximately 39,000 individual shareholders of the Company. The shares of the Company are listed in the Bombay Stock Exchange and are regularly quoted, and frequent transactions in shares take place. It is in this background, Division Bench in the earlier case Gujarat State Fertilizers Company Ltd. (supra) rejected the contention that major portion of the shareholding is controlled by the Government.

4 The Division Bench noticed the test laid down by Supreme Court in R.D. Shetty Vs. The International Airport Authority of India reported in AIR 1979 SC 1628 and Ajay Hasia Vs. Khalid Mujib reported in AIR 1981 SC 487. The following factors were culled out for determination whether the Company (G.S.F.C.) can be said to be an instrumentality or an agency of the Government:-

(i) If the major share capital of the Company is held by the Government, it would go a long way towards indicating that the Company is an instrumentality or an agency of the 'State'.

(ii) If the financial assistance of the State Government is so much to meet almost the entire expenditure of the Company, it would afford some indication of the Company being impregnated with Governmental character.

(iii) Whether the Company enjoys monopoly status as conferred to the 'State' or protected by the 'State'.

(iv) Whether deep and pervasive control of the 'State' exists over the Company.

(v) If the function of the Company is of public importance and closely related to the Governmental function and

(vi) If one or other Department of the 'State' is transferred to the Company.

The Division Bench also referred to other decisions of Supreme Court in *Somprakash Vs. Union of India* reported in AIR 1981 SC 212 and *Tekraj Vasandi alia, K.L. Basandhi vs. Union of India* reported in AIR 1988 SC 469. In *Tekraj Vasandi alia, K.L. Basandhi (supra)* Supreme Court was examining whether Institute of Constitutional and Parliamentary Studies registered under the Societies Registration Act could be regarded as an agency or instrumentality of the 'State' so as to come within the purview of 'State' under Article 12 of the Constitution. The other decision of Supreme Court in *Rajasthan State Electricity Board, Jaipur V/s. Mohan Lal* reported in AIR 1967 SC 1857 was also noticed. It is not necessary to refer to the rest of the decisions as was noticed by the Division Bench, including the Supreme Court decision in *L.I.C. vs. Escorts Ltd.* reported in AIR 1986 SC 1370.

5 The Division Bench observed that except certain percentage of shares being purchased by the Government of Gujarat and the Gujarat Industrial Investment Corporation, there is no other financial assistance given by the State to the Company, the Company has no monopoly status in manufacturing of fertilizer, which was also not the monopoly of the 'State', fertilizer is also being manufactured by private sector companies in India apart from public sector undertakings and 'State' has no monopoly in respect thereof, there was no pervasive 'State' control over the Company. Though some part of the shares were held by the Government of Gujarat and Gujarat Industrial Investment Corporation, there was no other control except presence of its Directors at the time of voting for electing independent persons as Directors. If Gujarat

Industrial Investment Corporation sells its shares, it will have no part to play even in the matter of election of any Director to the Board.

6 Following were the Directors of the Board when the Division Bench decided the case:

- "1. Shri Jaykrishna Harivallabhdas, Chairman (Nominated by the Government of Gujarat), Industrialist.
2. Shri Arvind N. Mafatlal, Industrialist.
3. Shri H.M. Patel, L.C.S. (retired).
4. Shri Arvind N. Lalbhai, Industrialist.
5. Shri R.B. Amin, Industrialist.
6. Shri T.K. Patel, Member of Parliament and Chairman, Gujarat State Co-operative Marketing Society Limited.
7. Shri Rohit C. Mehta, Industrialist
8. Shri F.N. Rana, IAS (retired).
9. Shri L.R. Dalal, ICS, Chief Secretary to the Government of Gujarat).
10. Shri M.D. Rajpal, LAS, Additional Chief Secretary to the Government of Gujarat.
11. Dr. S.K. Subramanian, (Nominated by the Industrial Development Bank of India).
12. Shri F.J. Heredia, LAS, Managing Director, (Nominated by the Government of Gujarat)."

7 Out of the aforesaid nominees, persons at Sr. Nos. 1, 9, 10 and 12 were nominees of Government of Gujarat, and the Director at Sr.No.11 was the nominee of the Industrial Development Bank of India. The other Directors were eminent persons in their own right. Even persons nominated by the Government of Gujarat and its Chairman are industrialists of repute, thereby the Division Bench noticed that the Board so constituted consisted of eminent independent persons.

Having noticed the aforesaid fact and that none of the tests is fulfilled by the Gujarat State Fertilizer Company, the Division Bench came to a

definite conclusion that the Company is not a 'State' within the meaning of Article 12 of the Constitution.

8 The Government Circular dated 14th March 2008, which was referred by the parties, due to which this Court referred the matter to Larger Bench, relates to requirement of prior approval of the Government in certain matter by the State Public Sector Enterprises, relevant portion of which reads as under:

"Requirement of prior approval of Government by the State Public Sector Enterprises. Government of Gujarat Finance Department GR No. JNV-1007-FM4-A(BPE) Sachivalaya, Gandhinagar Dated 14-03-2008 Read: Government Circular, Finance Department No.JNV-1480-224-A dated 18.2.1980 Preamble Instructions have been issued by the State Government vide Circular referred to in*the preamble above, for obtaining prior approval of the Government for various activities/matters by the State Public Sector Enterprises (PSEs). As the economic scenario of the country, as also the environment in which PSEs are working, has changed considerably over the years, and to enable Government to effectively monitor the working of the PSEs in order to fulfill its development and financial objectives, the issue of obtaining prior approval of the Government for some additional matters/activities by the state PSEs, as also to modify the existing instructions in some aspects, was under the consideration of Government. After careful consideration, and in supersession of the instructions contained in the-. Circular referred to in the preamble above, Government is pleased to decide as under: Resolution ' The prior approval of the State Government in the Bureau of Public Enterprises, Finance Department must be obtained by the State Public Sector Undertakings (Boards, Corporations, Companies etc.) for the following matters/ activities:- Corporate Affairs

1.Amendment in the Memorandum of Association or Articles of Association;

2.There is no need to take the prior approval for Directors appointed to the Board of Directors by financial institutions, debenture holders and organizations with whose assistance the project has been set up. Government is appointing Directors in case of companies totally owned by the State Government. But in PSEs not entirely owned by government, the appointment of Directors is done by the shareholders. In such case, the prior approval of the government should be obtained before selection of the Directors. In case a Memorandum of Understanding or Shareholders' Agreement entered into by a PSE authorizes it to appoint Directors, approval of the Government should be obtained before doing so. Prior approval of the Government should also be obtained by PSEs when appointing Directors in their subsidiary companies. Economy & Finance

3.If the PSE is signing a new Memorandum of Understanding (MOU) or Shareholders' Agreement (SHA) or making amendment in an existing one, then Government approval must be taken after it is signed but before a formal legal agreement is entered into, if there is any financial implication as a result of the MOU or SHA.

4.Incurring .capital expenditure on new projects, modernization, diversification, etc. in excess of Rs.100 crore, or equal to the PSE's net worth, whichever is lower.

5.Establishing new Companies in the public sector or joint/associate sector, joint ventures, subsidiaries and Special Purpose Vehicles (SPV) in India, where the equity investment of the PSE is in excess of Rs.100 crore in any one project, or exceeds 5% of the net worth of the PSE in any one project, or exceeds 15% of the net worth of the PSE in all joint ventures/subsidiaries put together. Establishing of new Companies/joint ventures/subsidiaries/SPV Abroad and opening of offices Abroad would require the prior approval of Government in all cases, irrespective of the amount involved.

6.Entering into technology joint ventures, strategic alliances and obtaining technology and know-how by purchase or other arrangement, subject to Government guidelines as may be issued from time to time.

7.Disinvestment of any nature leading to reduction in shareholding either in the PSE or in its subsidiary, whether such subsidiary is in India or outside; Performance Related

8.Quarterly results should be sent to Government in the standard prescribed format, if any. However, the. results will not require prior approval of Government.

9.Declaration of dividend where the PSE has defaulted in the payment/repayment of loans/interest. Personnel Related

10.Changes in the pay scale or service conditions of employees, where such changes are not within the guidelines of the Government, and overall modification in the pay scales of employees;

11.Paying bonus or any ex-gratia sum in lieu of bonus, where such payment is not in accordance with Government Guidelines or Instructions; Policy Related

12. Matters concerning public policy of the state or concerning National Security;

13. Any proposal which is not in accordance with general or specific instructions of the Government;

14. Matters in which approval of Government is legally required.

Since the ultimate responsibility of companies that are subsidiaries to a PSE rests on Government and such subsidiary is also a public sector enterprise, it is resolved that the above instructions shall apply in equal measure to all subsidiaries of State PSEs and such subsidiaries will also be required to obtain the prior approval of Government in all the above-mentioned matters/activities. It shall be the responsibility of the Government nominees on the Board of Directors of PSEs to support the policies of Government and to immediately draw Government's attention to any deviation in Board decisions, either in financial terms or in transparency, from the existing policies or instructions of Government. All the concerned officers of all administrative departments and Public Sector Enterprises are directed to strictly follow the above-mentioned instructions. By order and in the name of the Governor of Gujarat, Arvind Agarwal Secretary, Finance Department" From the aforesaid Circular, it will be evident that it relates to Public Sector Undertaking and the Companies in question.

9 According to the Respondent-G.S.F.C., it does not perform any function partaking the nature of public duties or 'State' action. The constitution of the Company clearly goes to show that it is not a Government Company as defined under Sec.617 of the Companies Act, 1956. Thus, in absence of any such relevant facts and materials, the writ petition is not maintainable.

Counsel for the Respondent-G.S.F.C. referred to Article 140 of the Articles of Association of the Company which provides that the Government will be entitled to nominate one-third of the Directors only (presently 2 Directors out of 8) and one of whom would be Chairman. He would submit that petitioners are not correct in creating a picture as if all the Directors are appointed by the State Government. Two-third Directors are appointed on the Board of Directors by the holding of equity shares, and except nominating some of the Directors, 'State' has no other role to play.

10 It was submitted that after the Division Bench judgment, the shareholding pattern of the Company has undergone a sea-change, and the holding of Government of Gujarat has come to 'zero' percent. The Government of Gujarat does not exercise any power, control or authority over the management of the business and affairs of the Company. G.S.F.C. is autonomous in deciding its own affairs. It is neither financially nor administratively dominated by or under the control of the State Government. A copy of the shareholding pattern as on 30.06.2009 has been enclosed, which is reproduced hereunder:

Statement showing Share-holding Pattern ANNEXURE-I

Name of the Company : Gujarat State Fertilizers & Chemicals Limited

Scrip Code G.S.F.C.	Name of the Scrip Shares	G.S.F.C. E.Q., Equity	Quarter ended 30.-6-2009
(A) Promoter and Promoter Group			
(1) Indian			
(a)	Individuals/Hindu Undivided Family	0 0	0.00
(b)	Central Government/State Government(s)	0 0	0.00
(c)	Bodies Corporate	8 30159981	37.84
(D)	Financial Institutions/Banks	0 0	0.00
(e)	Any other (specify)	0 0	0.00
	Sub-Total (A)(1)	8 30159981	37.84
(2) Foreign			
(a)	Individuals (Non-Resident Individuals/Foreign Individuals)	0 0	0.00
(b)	Bodies Corporate	0 0	0.00
(c)	Institutions	0 0	0.00
(d)	Any Other (specify)	0 0	0.00
	Sub-Total (A)(2)	0 0	0.00
	Total Share-holding of Promoter and Promoter Group (A) = (A)(1) + (A)(2)	8 30159981	37.84
(B) Public Share-holding Institutions			
(1)			
(a)	Mutual Funds/UTI	26 8637526	10.84
(b)	Financial Institutions/Banks.	70 80849	0.10

(c)	Central Government/State Government(s)	0	0	0.00
(d)	Venture Capital Funds	0	0	0.00
(e)	Insurance Companies	7	10504493	13.18
(f)	Foreign Institutional Investors	40	4065681	5.10
(g)	Foreign Venture Capital Investors	0	0	0.00
(h)	Any other (Specify) Sub-Total (B)(1)	0 143	0 23288549	0.00 29.22
(2) Non-institutions				
(a)	Bodies Corporate - Indian Individuals	1091	10611735	13.32
(b)	(i) Individual share-holders holding nominal share capital up to Rs. 1 lakh	90507	9874678	12.39
	(ii) Individual share-holders holding nominal share capital in excess of Rs. 1 lakh	93	4452664	5.59
	Any other : Trusts	5	2053	0.00
	Directors & their Relatives	2	2053	0.00
(c)	Non-Resident Indians	559	355598	0.45
	Overseas Corporate Bodies	1	49571	0.06
	Societies	1271	505319	0.63
	Hindu Undivided Families	677	394857	0.50
	Sub-Total (B)(2)	94206	26246976	32.93
	Total Public Share-holding (B) =(B)(1)+(B)(2)	94349	49535525	62.16
	TOTAL (A) + (B)	94357	79695506	100.00
(C)	Shares-holder by Custodians and against which Depository Receipts have been issued	0	0	0.00
	GRAND TOTAL (A)+(B)+(C)	94357	79695506	00.00

N.A. - Not applicable

**Sr.No. Name of the share- Total shares held
holder**

1	Gujarat State Investment Ltd.	Number 30159981	As a % of grand total (A) + (B) + (C) 37.84	As a % of grand total (A) + (B) + (C) of sub-clause (1.d)(a) 0.00
TOTAL		30159981	37.84	0.00

Sr. No.	Name of the share-holder	Number of shares	Shares as a percentage of total number of shares (i.e., Grand Total(A)+(B) + (C) indicated in	
1	Life Insurance Corp. of India	6920015	8.68	
2	Reliance Cap. Trustee Co. Ltd. A/c. Reliance Growth Fund	4243218	5.32	
3	Reliance Cap. Trustee Co. Ltd. Reliance Natural Resources Fund	3107424	3.90	
4	Uno Metals Ltd.	2040500	2.56	
5	Gujarat Narmada Valley Fert. Co. Ltd	1500000	1.88	
6	Gujarat Alkalies & Chemicals Ltd.	1500000	1.88	
7	AKG Finvest Ltd.	1266500	1.59	
8	Gujarat Mineral Development Corp.	1000000	1.25	
9	United India Insurance Co. Ltd.	891087	1.12	
10	Goldman Sachs Invest. (Mauritius) I. Ltd.	804729	1.01	
11	General Insurance Corp. of India	800822	1.00	
	Total	24074295	30.21	

11 Learned counsel for the petitioner would contend that the State Government by Circular dated 14th March 2008 has now taken control over the Boards, Corporations, Companies, etc. but the Circular as quoted above

will show that State Government has no direct control over the Company. There is nothing on record to come to a different conclusion other than that as held by the Division Bench pursuant to different decisions of the Supreme Court as referred to above. In this background, it will not be desirable to refer to any further decisions of Supreme Court or other Courts in absence of anything on record to differ with the finding.

12 On hearing the parties, we come to the following conclusions so far as Gujarat State Fertilizers and Chemicals Limited:-

- (i) The Company has been constituted under the Companies Act and not by any Act of the Legislature.
- (ii) The `State' has no role in the matter of functioning of the Company. It does not exercise any financial, functional or administrative control over the Company, much less an unusual degree of control over the management and policies of the Company.
- (iii) Acquisition of shares and other matters pertaining to management and affairs of the Company are governed under the Act.
- (iv) Terms and conditions of service of employees of the Company are governed by providing negotiations and mutual undertaking, like any other private contract between employer and employee, and there are no statutory rules or regulations framed by the `State' laying down the conditions of service of the employees of the Company.
- (v) The State Government does not hold any shares in the Company.
- (vi) The `State' nominates only two Directors, who are industrialists; rest of the Directors, who are in majority, are nominated by others.
- (vii) The business and other activities of the Company are purely of commercial nature, which neither performs any public function nor public duty. It does not carry on its business for the benefit of the public.

Thus, the cumulative factors together show that Gujarat State Fertilizers and Chemicals Limited is not an instrumentality of the `State'.

13 The writ petition - Special Civil Application No. 4263 of 2009 was filed by the petitioner challenging the order dated 31st March 2009 passed by the Gujarat Narmada Valley Fertilizers Company Limited (hereinafter referred to as `the respondent-Company'). By the said letter, the contract of employment of the petitioner as General Manager has been concluded and he has been relieved from the post.

14 The respondent-Company has raised the question of maintainability of the petition on the ground that it is not a 'State' within the meaning of Article 12 of the Constitution, and, therefore, the writ petition under Article 226 of the Constitution is not maintainable.

15 Apart from Gujarat State Investment Limited, Gujarat State Fertilizers and Chemicals Limited holds good number of shares of the respondent-Company. Two cases of the Gujarat State Fertilizers and Chemicals Limited having been referred to the Larger Bench, along with them, this case has also been referred to the Larger Bench.

16 Gujarat Narmada Valley Fertilizers Company Limited ('G.N.F.C.' for short) was incorporated on 10th May 1976 and promoted by G.S.F.C. along with others. It is a Public Limited Company. There is nothing on the record to show that it is a wholly owned undertaking of the Government of Gujarat or a Government Company as defined under Sec.617 of the Companies Act. The respondents have taken the plea that it is not a 'State' or instrumentality of the 'State' or 'authority' within the meaning of Article 12 of the Constitution of India.

17 The shares of the G.N.F.C. are listed at Bombay Stock Exchange and National Stock Exchange and are widely traded. According to the respondent-Company, the investment by Gujarat Sate Investment Limited is to the tune of 21.38% in the share capital of the respondent-Company. The current shareholding pattern of the respondent-Company has been enclosed at Annexure R-1 wherein the shareholding pattern as on 31st July 2010 has been shown as under:

SHARE HOLDING PATTERN AS ON 31ST JULY 2010

Sr. No. of Share-holder	Physical Form		Demat Form		Physical & Demat Form		% of Total Equity capital
	No. of Share holders	No. of Equity Shares	No. of Share holders	No. of Equity Shares	Total No. of Equity holders	Total No. of Equity Shares	

A. Promoter & Promoters Group

1	Gujarat State Investments Ltd. (G.S.I.L.)	10	33227546	0	0	10	33227546	21.39
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2 Gujarat State Fertilizers & Chemicals Ltd. (G.S.F.C.)	0	0	1	30779167	1	30779167	19.80
Sub-Total(A)	10	33227546	1	30779167	11	64006713	41.18
B Public							
1 Institutional Investor							
a Mutual Funds/ . UTI	11	17000	17	14231216	28	14248216	9.17
b Financial . Institutions Banks	27	15706	31	25444098	58	25459804	16.38
c Foreign . Institutional Investors	5	1250	65	7973007	70	7974257	5.13
Sub-Total (B1)	43	33956	113	47648321	156	47682277	30.68
2 Non . Institutional Investor							
a Bodies Corporate .	208	46526	1157	3702846	1365	3749372	2.41
b Co-operative . Societies	2588	352764	0	0	2588	352764	0.23
c Indian Public .	165000	11228361	101689	250824269	266689	363107876	23.36
d NRIs/OCBs/Foreign National	2070	1770683	1315	1377361	3385	3148044	2.03
Sub-Total (B2)	169866	13398334	104161	30162633	274027	43560967	28.03
3 Shares in pool A/c. (As reported by Depositories)	0	0	93	47586	93	47586	0.03
Sub-Total (B1 + B2+B3)	169909	13432290	104367	77858540	274276	91290830	58.74

C Shares held by Custodians and against which Depository Receipts have been issued (GDRs) (24.248 No of GDRs are outstanding with the Custodian)	0	0	1	121240	1	121240	0.08
Grand Total (A+B+C)	9	36	9	10436	1087589	27428	1554187
				47	8	83	100

18 The Memorandum and Articles of Association of the G.N.F.C. has been enclosed at Annexure R-2, which reveals that the respondent-Company can carry on in India and in any part of the world, the business of processing, converting, producing, manufacturing, formulating, using, buying, acquiring, storing, packaging, selling, transporting, distributing, importing, exporting and disposing of all types of fertilizers, chemicals, heavy chemicals, acids, alkalies, agro-chemicals and their by-products, derivatives and mixtures thereof, maintaining and rendering assistance and services of all and every kind of any description for selling, exchanging, altering, improving and dealing in artificial and other fertilizers, heavy chemicals, agro-chemicals and their by-products of every description, whether required for civil, commercial or military defence purposes and requirements or otherwise. It also deals with petrochemicals, plastics, methanol, melamine, etc. The objects incidental or ancillary to the attainment of the main objects include purchase, take on lease, mortgage or in exchange hire or otherwise acquire any movable or immovable property and any rights or privileges, which the Company may think necessary apart from other objects, like carrying on business of consultants and advisers, manufacture, import, export, etc. The following persons subscribed and formed into a Company in pursuance of the Memorandum of Association at the initial stage:

Name of Subscriber	Address, description and occupation of the subscriber	No. of shares taken by each subscriber	Signature of the subscriber	Signature of the witnesses and their addresses, description and occupation
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Jaykrishiia	S/o. HarivaHabhdas Kalidas, 'Gokul', Camp Road, Ahmedabad, Industrialist	1 One Equity	Sd/- Jaykrishna Hariva Habhdas
Hirubhai	S/o. Muljibhai Dwarkadas Patel, Vallabh Vidyanagar, I.C.S. (Retd.)	1 One Equity	Sd/- H. M. Patel
Ramanbhai	S/o. Bhailalbai D.Amin, Race Course Circle, Baroda, Industrialist	1 One Equity	Sd/- R. B. Amin
Har Krishen Lal Capoor	S/o. Shri Jadav Lal Capoor, 3, Shahibaug, Ahmedabad, Indian Administrative Service	1 One Equity	Sd/- H.K.L. Capoor
M.Sivagnanam	S/o. Shri G. Masilamani Pillai, K-5, Gandhinagar-382020	1 One Equity	Sd/- M. Sivagnanam
Mathuradas	S/o. Gordhandas Vallabhdas Shah, 29, Saurabh Society, Sanjay, Ahmedabad-380009, Indian Administrative Service	1 One Equity	Sd/-M.G. Shah
Madho Das	S/o. R.S.L. Niamatrai Rajpal, P.O. Fertilizer-nagar, Dist. Baroda, I.A.S. (Retd.)	1 One Equity	Sd/- M.D. Rajpal

Dated this 21st day of April, 1976

19 It appears that some confusion has taken place because of the letter dated 4th November 2008 issued by Bureau of Public Enterprises, Finance Department, Government of Gujarat in continuation of earlier letter dated 14th March 2008. Therein, requirement of prior approval of Government by the State Public Sector Enterprises, as mentioned in the earlier letter dated 14th March 2008, was clarified. It is relevant to notice the letter dated 4th November 2008, which has been relied upon by the counsel for the petitioners, which is quoted hereunder:

GOVERNMENT OF GUJARAT

Bureau of Public Enterprises,
Finance Department,
Block No.4, 8th Floor,
Sardar Bhavan,
Gandhinagar 382 010.
No. JNV-1007-FM4-4-A (part file)
4th November 2008

To
Chairman & Managing Director
Gujarat Narmada Valley Fertilizers Co. Ltd.
P.O. Narmadanagar 392 015 Dist. Bharuch
Managing Director
Gujarat State Fertilizers & Chemicals Ltd.
P.O. Fertilizer Nagar Vadodara 391750
Managing Director
Gujarat Alkalies & Chemicals
PO Petrochemicals Vadodara 391346
Managing Director
Gujarat Industrial Power Company
P.O. Petrochemicals, Vadodara 391346
Sub: Requirement of prior approval of Government by the State Public Sector Enterprises-
Ref: G.R.F.D.No.JNV-1007-FM4-A(BPE)dated 14/3/2008

Sir/Madam,

The State Government has issued a Government Resolution No. JNV-1007-FM4-A (BPE) dated 14/3/2008 (copy enclosed) directing that prior approval of Government should be taken on certain issues by the State public Sector Enterprises. An issue has arisen as to whether the G.R. is applicable to the joint sector companies, ie. Gujarat Narmada Valley Fertilizer Company Ltd., Gujarat State Fertilizers & Chemicals Ltd., Gujarat Alkalies & Chemicals Ltd., and Gujarat Industrial Power Company Ltd. The issue was examined by the State Government. The Government is of the opinion that since the State Government has invested substantial public fund in these

companies, either directly or through other companies/boards/corporations controlled by the Government, and since Government provides the services of very senior administrative officers to these companies on deputation, it is expected that these companies should manage their affairs keeping in mind the broad objectives of the Government in setting up the PSEs., ie. overall development and progress of the State and for the betterment and well being of the people. With a view to achieve these objectives, the senior Government officers posted in these companies as Managing Directors are expected to obtain prior approval of the Government on the matters contained in the G.R. dated 14/3/2008, before putting up such matters to the Board of decision. In other words, the Managing Directors of these companies should put up the matter covered in the G.R. dated 14/3/2008 to their respective Board of Directors only after obtaining approval of the State Government. It is requested that the above mentioned instructions should be implemented strictly.

Yours faithfully,
Sd/-
(Arvind Agarwal)
Commissioner (BPE) &
Secretary, Finance Department

20 Learned counsel for the petitioners would contend that by the aforesaid letter dated 4th November 2008, Government of Gujarat has clarified that Gujarat Narmada Valley Fertilizers Company Limited and Gujarat State Fertilizers and Chemicals Company Limited and two other Companies are also required to take prior approval pursuant to the letter dated 14th March 2008, and therefore, the respondent-Company is a Government of Gujarat Undertaking. The respondent-State of Gujarat has filed a reply affidavit and stated that the aforesaid Resolution was issued to the State Public Sector Enterprises, such as Boards, Corporations and the Government Companies u/Sec.617 of the Companies Act, wherein majority of the shareholding is of the State Government with the assistance of financial institutions, debenture holders and/or other organizations, which are governed by their own constitutions, memorandum of association and/or articles of association. In such cases, since the Government is required to effectively monitor the working of the State Public Sector Enterprises, in order to fulfil the development, the Resolution dated 14th March 2008 was issued.

So far as the issue of control and supervision with regard to other joint sector companies, such as Gujarat Narmada Valley Fertilizers Company Limited and Gujarat State Fertilizers and Chemicals Ltd. is concerned, the same is examined by the State Government in the letter dated 4th November 2008. The Government has found that it has control over such companies only to the extent of its shareholding and from that point of view, the broad objective of the State can be taken care of by directing its officers posted in such companies to seek prior approval of the

Government before putting up the matters concerning the interest of the `State' before the Board of such joint sector companies. It has taken a specific plea that for the purpose of Article 12 of the Constitution of India, such companies could not be said to be under deep and pervasive administrative, functional and financial control of the State Government. These are essentially entities managed by their respective Boards of Directors as provided by their respective Memorandum of Association and Articles of Association.

21 In the present case, there is nothing on record to suggest that the State Government has any share in Gujarat Narmada Valley Fertilizers Company Limited as no specific evidence is brought on record. Gujarat State Fertilizers and Chemicals Limited, which has 19.80% share, is not a `State' within the meaning of Article 12 of the Constitution of India. The State of Gujarat has taken a specific plea that as it has no deep and pervasive administrative, functional and financial control and the respondent-Company is an entity managed by its Board of Directors.

22 We have noticed that G.N.F.C. has been constituted under the Companies Act and not by any State Act. The State Government has no role in the matter of functioning of the Company. It does not exercise any financial, functional or administrative control over the Company. Acquisition of shares and other matters pertaining to management and affairs of the Company are governed under the Companies Act. The business and other activities of the Company are purely commercial in nature. It does not perform any public function nor any public duty. The Company do not carry on any business for the benefit of public. Thus, as the cumulative effect together shows that Gujarat Narmada Valley Fertilizers Company Limited is not an instrumentality of the `State'.

23 In view of our finding as recorded above, we hold that both the Companies, i.e. Gujarat State Fertilizers and Chemicals Limited and Gujarat Narmada Valley Fertilizers Company Limited, are neither `State' as defined under Article 12 of the Constitution of India nor an instrumentality or authority of the State, and therefore, writ petition under Article 226 of the Constitution of India is not maintainable against them. The judgement rendered by Division Bench decision in the case of Gujarat State Fertilizers Company Ltd. Vs. Association of Officers, G.S.F.C. reported in 1995(2) GLH 179 is thus affirmed. All the three writ petitions being not maintainable are dismissed. There shall be no order as to costs.