Chapter VI
CONCLUDING OBSERVATIONS

Having analysed the different aspects of judicial control of public corporations in modern India, we may sum up the main problems of the subject and state the concluding observations.

The most disturbing problem in connection with public corporations, especially those responsible for the management of the nationalised industries, is undoubtedly that of control. Few would contend that the nationalised industries which are managed by the public corporations should be left freely of control (i.e. with freedom of action) and free from accountability (i.e. irresponsible for their actions). However, a powerful corporation, having great financial resources, employing many personnel and possessing monopolistic powers conferred by statute, should be answerable in some measure to the elected representatives of the nation and to the courts of law. Judicial control thus forms an integral part of the problem of accountability.

The ordinary means of judicial control over the activities of any government agency apply equally, at least in theory, to a public corporation; indeed the jurisdiction of the courts over a public corporation is the same as it is over any private or public company, except that the powers of the former depend
on the terms of a special statute, while the powers of a company will depend on the terms of its memorandum of association.

The first question that arises is whether the public corporations are subject to the absolute control of the judiciary, or, whether, being government corporations, they are entitled to some of the immunities enjoyed by the government. In this connection it may be pointed out that it has been particularly difficult to determine the legal status of the public corporation as the liability of the State itself has been a problem which continues to plague most legal systems and the position in India is in no way different. The case law of the legal liability of the State in India does not afford much assistance. As far as the contractual liability of the State is concerned, the status of the government is the same as that of an individual under the ordinary law of contract. But the law relating to the liability of the State for tortious acts is in a state of uncertainty. The governmental-proprietary distinction introduced over a century ago by Chief Justice Peacock in Peninsular and Oriental Steam Navigation Co. v. Secretary of State for India¹, still determines the tort liability of the State. It has produced most awkward results and the judges have urged reforms in the law. The latest decision of the Supreme Court on the point was in Kasturi Lal v. State of Uttar Pradesh².

Here the police officers arrested the plaintiff on suspicion of possessing stolen property and upon searching his person a large quantity of gold was seized. Ultimately he was released but the gold seized from him was not returned as it was misappropriated by the chief constable in charge of the malkhana who fled to Pakistan. It was held by the Supreme Court that the manner in which the gold had been dealt with showed gross negligence on the part of the police officers and that the loss suffered by the plaintiff was due to the negligence of the police officers of the State. Yet the plaintiff could not obtain relief as the act of negligence was committed in dealing with property which was seized in exercise of statutory powers. Speaking for the Supreme Court, Gajendragadkar C.J. observed: ".........the employment in question being of the category which can claim the special characteristics of sovereign power, the claim cannot be sustained, and so we inevitably hark back to what Chief Justice Peacock decided in 1861 .........". 3

However, if the doctrine of sovereign immunity extends to all acts done in the exercise of statutory powers in the present-day of all embracing planning and statute laws, very little is left of the tort liability of the State. This state of the law is highly unsatisfactory. The same opinion was expressed by the Supreme Court in Kasturi Lal v. State of

3. Reference is to the decision in P & O Steam Navigation Co. v. Secretary of State for India, (1861) 5 Bom. H.C.R. App. 1.
Uttar Pradesh in the following terms:

In dealing with the present appeal, we have ourselves been disturbed by the thought that a citizen whose property has been seized by process of law, has to be told when he seeks a remedy in a court of law that he can make no claim against the State. That we think is not a very satisfactory position in law. The remedy to cure this position, however, lies in the hands of the legislature.

It is respectfully submitted that the unsatisfactory position of the law referred to by the Supreme Court of India calls for urgent reforms. It is imperative that legislation on the lines of the Crown Proceedings Act, 1947 of the United Kingdom should be passed for the purpose of regulating and controlling the claim of immunity of the State.

However, it is evident that the Government of India does not enjoy absolute immunity from judicial proceedings. But even if it was entitled to such immunity, the public corporations could not have successfully claimed to share it. A public corporation is not entitled to governmental immunities as being the servant or agent of the government unless the statute setting up the corporation expressly enacts that it acts on behalf of the government, or unless the corporation is otherwise rightly regarded as such a servant or agent, or the title to the immunity is the logical and necessary consequence

of the character of the corporation's powers and responsibilities. In Tamlin v. Hannaford it was laid down that a public corporation like the British Transport Commission is not the servant or agent of the Crown. Since the public corporations in India are of the same type, it is clear that in the eye of law they are their own master and are answerable as fully as any other corporation.

In India, the Acts creating public corporations do not explain clearly the general liability of these corporations in law. These merely provide that the corporation can "sue and be sued". Notwithstanding this general liability to be sued, the statutes in most cases provide some special protection. Sometimes the Act setting up public corporations provides for special procedures and special penalties. In some of the statutes there are also special provisions as regards institution of criminal proceedings in respect of offences committed under the statutes. This is a precautionary measure against indiscriminate prosecution by private persons.

An important means through which judicial control over public corporations is exercised, is, the doctrine of ultra vires. In the application of the doctrine there are three issues: firstly, whether what is done is specifically authorised by statute; secondly, whether (if there be no specific authority)
one can reasonably imply authority from the language of the statute; and thirdly, whether an act for which no such direct or implied authority is found is reasonably incidental to the carrying into effect of a statutory purpose. Since the powers of the public corporations are derived solely from statutes and statutory instruments, they are subject to judicial determination by the doctrine of *ultra vires* in its full force. It is through its *ultra vires* jurisdiction that the judiciary asserts its functions of protecting the citizen against encroachments of the executive and public authorities, both in their capacity as legislators by delegation and as quasi-judicial authorities. But in India as in other countries the statutory powers conferred on the corporations are so widely drawn that the *ultra vires* doctrine as a means of exercising judicial control over the activities of the corporation becomes nugatory.

A public corporation may be liable in tort and contract. Where the liability of an employer for the acts of his servants is in issue, there are normally three possible situations:

1. The employer has authorised the servant to commit the tort.
2. The servant has committed the tort in the course of his employment.
3. The servant has committed the tort while acting outside the scope of his employment: the only one of the three cases where the employer is not also liable.
It is submitted by Harry Street⁷ that where the employer is a corporation, there are exactly the same three possibilities. As there is no codified law of torts in India, the courts have generally followed the relevant English law. The liability of a public corporation in tort is likely to arise by its acts and omissions and the actions most commonly brought are for trespass, negligence, nuisance, breach of trust, and occasionally fraud or conversion. Before a corporation is liable, it must be shown that the relation of principal and agent or of master and servant existed between the corporation and the person who committed the act. In this connection it is useful to note that a master is not responsible for the negligence of his servant while engaged in doing something which he is permitted to do for his own purposes, but not employed to do for his master. A statute creating a public corporation confers duties and powers over it. Very often it may not be possible to exercise the same without interfering with private rights. Statutory authorisation will generally be a defence for an action for tort.

Similarly, a public corporation may be liable in contract. The powers of a corporation to make a contract vary according to the character of the corporation. Contracts with a corporation are often required by the Act creating it to be executed in a particular form, as for instance, under seal. The question in such cases is whether the Act is imperative and

not subject to any implied exception when the consideration has been executed in favour of the corporation. Where a statute contains a specific provision that a body corporate has to act in a particular manner and in no other, that provision of law, being mandatory and not directory has to be strictly followed. A public corporation cannot undertake by contract to do something which is not related to the powers conferred by the statute. Similarly, a public corporation cannot by contract disable itself from performing its statutory duty. Again, any contract which tends to be injurious to the public or against the public good would be void as being contrary to public policy. However, if proper contracts are executed by public corporations lawfully, they would be fully liable for breach of these contracts, unless protection was afforded by the Act.

A public corporation may also be liable under certain Acts such as the Industrial Disputes Act, the Income-tax Act, the Sales-tax Act, etc.

Judicial control also comes in with regard to the question of fixing of compensation. A characteristic feature of British nationalization legislation is its axiomatic insistence on the principle that compensation must be paid for assets transferred from private to national ownership. In India, such insistence is not only axiomatic but also compulsory so that the statutes dealing with nationalization may not be
ultra vires the Constitution of India. Article 31(2) of the Constitution says that "No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law, and no such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash".

In Kesavananda v. State of Kerala, the majority held that the amount fixed or the principle laid down for the determination of the amount must have a reasonable relation to the property acquired, and if the amount is illusory and has no relation to the property sought to be acquired or requisitioned, the courts can strike down such law as invalid. It is obvious from Article 31(2A) that a law which provides for the transfer of the ownership or right to possession of a property to a corporation owned or controlled by the State shall be deemed to provide for the compulsory acquisition or requisitioning of property.

Despite the paucity of cases relating to public corporations, the judiciary has ample scope for exercising control. The most important methods through which judicial control may be

effectively exercised are (a) methods based on the Constitution and (b) methods based on ordinary law.

Methods based on the Constitution: As a public authority, a public corporation is liable to action based on the Constitution, by way of directions, orders, or writs in the nature of *mandamus*, *certiorari* and prohibition. Under Article 32 of the Constitution of India the Supreme Court is empowered to issue directions, orders or writs for the protection of the fundamental rights guaranteed by Part III of the Constitution. Since it has been decided that public corporations in India are to be included within the meaning of the term "State" as defined in Article 12, for the purpose of fundamental rights, so it follows that public corporations would be amenable to judicial control under Article 32 of the Constitution.

Similarly, Article 226 also could be resorted to for controlling public corporations, because this Article confers a power on the High Courts to issue certain directions, orders or writs not only for the enforcement of the rights conferred by Part III of the Constitution but also for "any other purpose". Thus, it is evident that in India, the Supreme Court and the High Courts can effectively control the public corporations under Articles 32 and 226 of the Constitution respectively.

From the standpoint of judicial control over public corporations, *mandamus* is the most important of all writs,
because mandamus covers administrative as well as judicial aspects whereas certiorari and prohibition apply only to judicial and quasi-judicial functions. The tribunals established under the different Acts initiating public corporations in India may be restrained by means of these writs.

Methods based on Ordinary Law: Public corporations, being special public authorities and not commercial companies, are subject to methods based on ordinary law, such as an action for damages, injunctions, declaratory judgements, action for specific performance, etc.

An analysis of the different methods, viz., Methods based on the Constitution and Methods based on Ordinary Law shows that judicial control can be effectively exercised over the public corporations in our country.

Judicial control may also be exercised through control of public corporations by tribunals set up under the initiating Acts to deal with certain matters connected with that particular corporation. These tribunals are again subject to further control by the law courts.

The avenues through which the courts extend their control over tribunals vary from the subtle influences arising out of the prescription of tribunal procedures in close conformity with that of the courts and the appointment of a member of the

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9. e.g., see the Air Corporations Act, section 25, the Life Insurance Corporation Act, section 17(1) and the Employees' State Insurance Act, sections 74(i) and 73(9).
courts as the member of a tribunal to the direct methods of alternative suits, petitions, references, revisions and appeals in courts. Statutes imposing final jurisdiction on tribunals do not, however, affect the powers of the Supreme Court and the High Courts to issue the writ of certiorari and other appropriate writs, orders or directions. The jurisdiction of the Supreme Court to grant special leave under Article 136 of the Constitution of India is also not in any way affected. The High Courts, as we have seen above, could control the tribunals under Article 226, by issuing writs, orders or directions for the purpose of fundamental rights or "for any other purpose". The tribunals created by the initiating Acts are also subject to the superintendence of the High Courts under Article 227. Whenever it is brought to the High Court's notice that orders passed by tribunals or subordinate courts are illegal and deserve to be set aside, it can exercise its power of superintendence in that behalf in whatever manner the said illegal orders comes to its notice. It is obvious that even the finality clause cannot curtail such power of superintendence.

Under the existing law, no right of action is available to an individual against a public corporation to prevent the waste of public funds or injury to public property or to restrain a threatened illegal official act unless his personal interest is affected. Thus judicial control over an important aspect of public corporations is restricted. It is respectfully submitted that this malady could be eradicated by a suitable legislation
on the model of the American Act of 1872 entitled "An Act for the protection of tax payers against the frauds, embezzlements and wrongful acts of public officers and agents" as amended from time to time.\textsuperscript{10}

In India, judicial control over public corporations is not being exercised effectively because of the conspicuous absence of any proper review of the nature and working of these corporations. The decision of the Supreme Court in Joseph Kuruvilla Vellukunnel v. The Reserve Bank of India and Others\textsuperscript{11} in which some review of the appointment of the board members has been made is the only exception. Most of the cases relate to some minor aspect of the corporation.

Recently, however, quite a number of cases involving the public corporations on vital matters came up before the judiciary. In some of these cases, the very right of the judiciary to intervene in the affairs of the public corporations was questioned by way of reference.\textsuperscript{12} But the judiciary stated in unequivocal terms that it undoubtedly possesses the power to intervene in specific cases. In K.Chelliah v. Chairman, Industrial Finance Corporation\textsuperscript{13}, the court concluded that the Board functioning under the Industrial Finance Corporation Act, 1948,


\textsuperscript{12} e.g. see K.Chelliah v. Chairman, Industrial Finance Corporation, A.I.R. (1973) Mad. 122.

\textsuperscript{13} A.I.R. (1973) Mad. 122.
is a public authority and its order is a decision which is susceptible to judicial review. There is a long catena of cases in which it has been held that a person aggrieved can invoke the writ jurisdiction of the High Court under Article 226 of the Constitution or of the Supreme Court under Article 32 of the Constitution against public corporations in regard to proceedings against their employees. Again, where a public corporation failed to carry out a statutory obligation, the judiciary found no force in the argument that the provisions of the section were not of obligatory nature, or that those provisions could be violated with impunity.

In India, the powers and duties of public corporations have materially increased and there is no likelihood that the general trend of expansion will be reversed. With the increase of the power of the public corporations it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, it is imperative that courts evolve the principles to be observed by the public corporations while exercising such powers. In matters like these, public good is not advanced by a rigid adherence to precedents. New problems call for new solutions. The modern rule of law is not a bare

14. See Chapter IV.
sentinel to keep up orthodox traditions but is expected to be an active participant in almost every sphere of activity in society in the changed role of a Service State and a Welfare State. The influence of the doctrine of natural justice over such functions of the State or its instrumentalities reflects the interactive functions of case and statute laws and the growing influence of sociological jurisprudence over our legal thinking. The concept of rights has undergone a radical change due to forward and progressive ideals with which the community is publicly charged. Such an explosive rationalism in the understanding of rights of citizens all round which has become deeprooted in society cannot lightly be ignored or allowed to be engulfed in the halo of orthodox traditionalistic judicial dicta, convention or jurisprudence. If this progression is borne in mind, it is indisputable that even the orders passed by the public corporation which is but an instrumentality of the State and which is functioning under a particular statute is also bound to look after and protect the rights of citizens with whom it comes across. It cannot on the bare assertive principle of master and servant act beyond the pale of the norms set and accepted to be applicable to proceedings before the public corporation and consider the rights of persons before them to their detriment. It may be that the public corporation may have the discretion to deal with such problems. But such discretion should be exercised judiciously and judicially so that the
parties appearing before them may not be unduly affected and prejudiced.¹⁶

Judicial control is exercised to see that the public corporations act according to law. They must not act beyond the scope of the powers conferred on them, they must exercise their discretion for the purpose for which it was intended, such discretion must be exercised in accordance with the procedure prescribed for that purpose and they must not act mala fide.

It is respectfully submitted that in India the ultra vires supervision over public corporations, or the corresponding judicial control is limited in scope. If the doctrine of ultra vires is to work at all, the powers which the courts are called on to interpret must be clearly defined and must be kept within ascertainable limits. The present tendency is to define them so loosely that interpretation becomes mere subjective guess-work, and therefore, in effect, is excluded altogether. It is important that the public corporations should, more explicitly and unambiguously than at present, be liable for their ordinary legal transactions in the same manner as another legal person. The vast majority of potential conflicts are removed from the judicial forum by the width and elasticity of the powers of the corporations. This increases the importance of adequate public

control, by means of ministerial supervision, parliamentary debate, public auditing and periodical check through parliamentary sub-committees. Advocates and opponents of public enterprise are agreed on the necessity to subject it to legal liability and commercial accountability. The public corporation is an institution deliberately designed to integrate public enterprise with the existing Indian legal system. The courts can further this objective, by a full appreciation and application of the principles governing the public corporation. They can hinder it by applying nineteenth century ideas to twentieth century problems. It is the lawyer's task to improve and sharpen the legal tools.