PETITIONER:

M.C. MEHTA AND ANR.

Vs.

RESPONDENT:

UNION OF INDIA & ORS.

DATE OF JUDGMENT 20/12/1986

BENCH:

BHAGWATI, P.N. (CJ)

MISRA RANGNATH

OZA, G.L. (J)

DUTT, M.M. (J)

SINGH, K.N. (J)

CITATION:

1987 AIR 1086 1987 SCR (1) 819

1987 SCC (1) 395 JT 1987 (1) 1

1986 SCALE (2)1188

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (Civil) No. 12739 of 1985.

(Under Article 32 of the Constitution of India.) Petitioner-in-person.

B. Datta, Additional Solicitor General, A.B. Diwan, F.S. Nariman, B.R.L. lyengar, Hardev Singh, Hemant Sharma, C.V.S. Rao, R.D. Aggarwal, Ms. S. Relan, R.S. Sodhi, S. Sukumaran, Ravinder Narain, D.N. Mishra, Aditya Narayan, Ms. Lira Goswami, S. Kachwaha, Mohan, Ravinder Bana, K.C. Dua, K. Kumaramangalam, O.C. Jain and K.R.R. Pilai for the Respondents.

Raju Ramachandran for the Intervener.

Soli J. Sorabji for Citizens Action Committee. The Judgment of the Court was delivered by

BHAGWATI, CJ. This writ petition under Article 32 of the Constitution has come before us on a reference made by a Bench of three Judges. The reference was made because certain questions of seminal importance and high constitutional significance were raised in the course of arguments when the writ petition was originally heard. The facts giving rise to the writ petition and the subsequent events have been set out in some detail in the Judgment given by the Bench of three Judges on 17th February 1986, and it is therefore not necessary to reiterate the same. Suffice it to state that the Bench of three Judges

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permitted Shriram Foods and Fertiliser Industries (hereinafter referred to as Shriram) to restart its power plant as also plants for manufacture of caustic chlorine including its byproducts and recovery plants like soap, glycerine and technical hard oil, subject to the conditions set out in the Judgment. That would have ordinarily put an end to the main controversy raised in the writ petition which was filed in order to obtain a direction for closure of the various units of Shriram on the ground that they were hazardous to the community and the only point in dispute which would have survived would have been whether the units of Shriram should be directed to be removed from the place where they are presently situate and relocated in another place where there would not be much human habitation so that there would not be any real danger to the health and safety of the people. But while the writ petition was pending there was escape of oleum gas from one of the units of Shriram on 4th and 6th December, 1985 and applications were filed by the Delhi Legal Aid & Advice Board and the Delhi Bar Association for award of compensation to the persons who had suffered harm on account of escape of oleum gas. These applications for compensation raised a number of issues of great constitutional importance and the Bench of three Judges therefore formulated the issues and asked the petitioner and those supporting him as also Shriram to file their respective written submissions so that the Court could take up the hearing of these applications for compensation. When these applications for compensation came up for hearing it was felt that since the issues raised involved substantial questions of law relating to the interpretation of Articles 21 and 32 of the Constitution, the case should be referred to a larger Bench of five Judges and this is how the case has now come before us.

Mr. Diwan, learned counsel appearing on behalf of Shriram raised a preliminary objection that the Court should not proceed to decide these constitutional issues since there was no claim for compensation originally made in the writ petition and these issues

could not be said to arise on the writ petition. Mr. Diwan conceded that the escape of oleum gas took place subsequent to the filing of the writ petition but his argument was that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation for the victims of oleum gas but no such application for amendment was made and hence on the writ petition as it stood, these constitutional issues did not arise for consideration. We do not think this preliminary objection raised by Mr. Diwan is sustainable. It is undoubtedly true that the petitioner could have applied for amendment of the writ petition so as to include a claim for compensation but merely because he did

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not do so, the applications for compensation made by the Delhi Legal Aid & Advice Board and the Delhi Bar Association cannot be thrown out. These applications for compensation are for enforcement of the fundamental right to life enshrined in Article 21 of the Constitution and while dealing with such applications, we cannot adopt a hypertechnical approach which would defeat the ends of justice. This Court has on numerous occasions pointed out that where there is a violation of a fundamental or other legal right of a person or class of persons who by reason of poverty or disability or socially or economically disadvantaged position cannot approach a Court of law for justice, it would be open to any public spirited individual or social action group to bring an action for vindication of the fundamental or other legal right of such individual or class of individuals and this can be done not only by filing a regular writ petition but also by addressing a letter to the Court. If this Court is prepared to accept a letter complaining of violation of the fundamental right of an individual or a class of individuals who cannot approach the Court for justice, there is no reason why these applications for compensation which have been made for enforcement of the fundamental right of the persons affected by the oleum gas leak under Article 21 should not be entertained. The Court while dealing with an application for enforcement of a fundamental right must look at the substance and not the form. We cannot therefore sustain the preliminary objection raised by Mr. Diwan. The first question which requires to be considered is as to what is the scope and ambit of the jurisdiction of this Court under Article 32 since the applications for compensation made by the Delhi Legal Aid and Advice Board and the Delhi Bar Association are applications sought to be maintained under that Article. We have already had occasion to consider the ambit and coverage of Article 32 in the

Bandhua Mukti Morcha v. Union of India & Ors., [1984] 2 SCR 67 and we wholly endorse what has been stated by one of us namely, Bhagwati, J. as he then was in his judgment in that case in regard to the true scope and ambit of that Article. It may now be taken as well settled that Article 32 does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but it also lays a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to' enforce the fundamental rights. It is in realisation of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights,

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particularly in the case of the poor and the disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.

Thus it was in S,P. Gupta v. Union of India, [1981] Supp. SCC 87 that this Court held that "where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened, and any such person or determinate class of persons is by reason of poverty or disability or socially or economically disadvantaged position unable to approach the court for relief, any member of the public or social action group can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 and in case of breach of any fundamental right of such person or class of persons, in this Court under Article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons." This Court also held in S.P. Gupta's case (supra) as also in the People's Union for Democratic Rights and Ors. v. Union of India, [1983] 1 SCR 456 and in Babdhua Mukti Morcha's case (supra) that procedure being merely a handmaden of justice it should not stand in the way of access to justice to the weaker sections of Indian humanity and therefore where the poor and the disadvantaged are concerned who are barely eking out a miserable existence with their sweat and toil and who are victims of an exploited society without any access to justice, this Court will not insist on a regular writ petition and even a letter addressed by a public spirited individual or a social action

group acting probono publico would suffice to ignite the jurisdiction of this Court. We wholly endorse this statement of the law in regard to the broadening of locus standi and what has come to be known as epistolary jurisdiction.

We may point out at this stage that in Bandhua Mukti Morcha's case (supra) some of us apprehending that letters addressed to individual justices may involve the court in frivolous cases and that possibly the view could be taken that such letters do not invoke the jurisdiction of the court as a whole, observed that such letters should not be addressed to individual justices of the court but to the Court or to the Chief Justice and his companion judges. We do not think that it would be right to reject a letter addressed to an individual justice of the court merely on the ground that it is not addressed to the court or to the Chief Justice and his companion Judges. We must not forget that

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letters would ordinarily be addressed by poor and disadvantaged persons or by social action groups who may not know the proper form of address. They may know only a particular Judge who comes from their State and they may therefore address the letters to him. If the Court were to insist that the letters must be addressed to the court, or to the Chief Justice and his companion Judges, it would exclude from the judicial ken a large number of letters and in the result deny access to justice to the deprived and vulnerable sections of the community. We are therefore of the view that even if a letter is addressed to an individual Judge of the court, it should be entertained, provided of course it is by or on behalf of a person in custody or on behalf of a woman or a child or a class of deprived or disadvantaged persons. We may point out that now there is no difficulty in entertaining letters addressed to individual justice of the court, because this Court has a Public Interest Litigation Cell to which all letters addressed to the Court or to the individual justices are forwarded and the staff attached to this Cell examines the letters and it is only after scrutiny by the staff members attached to this Cell that the letters are placed before the Chief Justice and under his direction, they are listed before the Court. We must therefore hold that letters addressed to individual justice of the court should not be rejected merely because they fail to conform to the preferred form of address. Nor should the court adopt a rigid stance that no letters will be entertained unless they are supported by an affidavit. If the court were to insist on an affidavit as a condition of entertaining the letters the entire object and purpose of epistolary jurisdiction would be frustrated because most of the poor and disadvantaged persons will then not be able to have easy access to the Court

and even the social action groups will find it difficult to approach the Court. We may point out that the court has so far been entertaining letters without an affidavit and it is only in a few rare cases that it has been found that the allegations made in the letters were false. But that might happen also in cases where the jurisdiction of the Court is invoked in a regular way: So far as the power of the court under Article 32 to gather relevant material bearing on the issues arising in this kind of litigation, which we may for the sake of convenience call social action litigation, and to appoint Commissions for this purpose is concerned, we endorse. what one of us namely, Bhagwati, J., as he then was, has said in his Judgment in Bandhua Mukti Morcha's case (supra). We need not repeat what has been stated in that judgment.' It has our full approval.

We are also of the view that this Court under Article 32(1) is free

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to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the Court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed vide Bandhua Mukti Morcha's case (supra). If the Court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the Court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile. We must, therefore, hold that Article 32 is not powerless to assist a person when he finds that his fundamental right has been violated. He can in that event seek remedial assistance under Article 32. The power of the Court to grant such remedial relief may include the power to award compensation in appropriate cases. We are deliberately using the words "in appropriate cases" because we must make it clear that it is not in every case where there is a breach of a fundamental right committed by the violator that compensation would be awarded by the Court in a petition under Article 32. The infringement of the fundamental right must be gross and

patent, that is, incontrovertible and ex facie glaring and either such infringement should be on a large scale affecting the fundamental rights of a large number of persons, or it should appear unjust or unduly harsh or oppressive on account of theft poverty or disability or socially or economically, disadvantaged position to require the person or persons affected by such infringement to initiate and pursue action in the civil courts. Ordinarily, of course, a petition under Article 32 should not be used as a substitute for enforcement of the right to claim compensation for infringement of a fundamental right through the ordinary process of civil court. It is only in exceptional cases of the nature indicated by us above, that compensation may be awarded in a petition under Article 32. This is the principle on which this Court awarded compensation in Rudul Shah v. State of Bihar, (AIR 1983 SC 1086). So also, this Court awarded compensation to Bhim Singh, whose fundamental right to personal liberty was grossly violated by the State of Jammu and Kashmir. If we make a fact analysis of the cases where compensation has been

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awarded by this Court, we will find that in all the cases, the fact of infringement was patent and incontrovertible, the violation was gross and its magnitude was such as to shock the conscience of the court and it would have been gravely unjust to the person whose fundamental right was violated, to require him to go to the civil court for claiming compensation.

The next question which arises for consideration on these applications for compensation is whether Article 21 is available against Shriram which is owned by Delhi Cloth Mills Limited, a public company limited by shares and which is engaged in an industry vital to public interest and with potential to affect the life and health of the people. The issue of availability of Article 21 against a private corporation engaged in an activity which has potential to affect the life and health of the people was vehemently argued by counsel for the applicants and Shriram. It was emphatically contended by counsel for the applicants, with the analogical aid of the American doctrine of State Action and the functional and control test enunciated by this Court in its earlier decisions, that Article 21 was available, as Shriram was carrying on an industry which, according to the Government's own declared industrial policies, was ultimately intended to be carried out by itself, but instead of the Government immediately embarking on that industry, Shriram was permitted to carry it on under the active control and regulation of the Government. Since the Government intended to ultimately carry on this industry and the mode of carrying on the

industry could vitally affect public interest, the control of the Government was linked to regulating that aspect of the functioning of the industry which could vitally affect public interest. Special emphasis was laid by counsel for the applicants on the regulatory mechanism provided under the Industries Development and Regulation Act, 1951 where industries are included in the schedule if they vitally affect public interest. Regulatory measures are also to be found in the Bombay Municipal Corporation Act, the Air and Water Pollution Control Acts and now the recent Environment Act, 1986. Counsel for the applicants also pointed to us the sizable aid in loans, land and other facilities granted by the Government to Shriram in carrying on the industry. Taking aid of the American State Action doctrine, it was also argued before us on behalf of the applicants that private activity, if supported, controlled or regulated by the State may get so entwined with governmental activity as to be termed State action and it would then be subject to the same constitutional restraints on the exercise of power as the State.

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On the other hand, counsel for Shriram cautioned against expanding Article 12 so as to bring within its ambit private corporations. He contended that control or regulation of a private corporations functions by the State under general statutory law such as the Industries Development and Regulation Act, 1951 is only in exercise of police power of regulation by the State. Such regulation does not convert the activity of the private corporation into that of the State. The activity remains that of the private corporation, the State in its police power only regulates the manner in which it is to be carried on. It was emphasised that control which deems a corporation, an agency of the State, must be of the type where the State controls the management policies of the Corporation, whether by sizable representation on the board of management or by necessity of prior approval of the Government before any new policy of management is adopted, or by any other mechanism. Counsel for Shriram also pointed out the inappositeness of the State action doctrine to the Indian situation. He said that in India the control and function test have been evolved in order to determine whether a particular authority is an instrumentality or agency of the State and hence 'other authority' within the meaning of Article 12. Once an authority is deemed to he 'other authority' under Article 12, it is State for the purpose of all its activities and functions and the American functional dichotomy by which some functions of an authority can be termed State action and others private action, cannot operate here. The learned counsel also pointed out that those rights which are specifically

intended by the Constitution makers to be available against private parties are so provided in the Constitution specifically such as Articles 17, 23 and 24. Therefore, to so expand Article 12 as to bring within its ambit even private corporations would be against the scheme of the Chapter on fundamental rights. In order to deal with these rival contentions we think it is necessary that we should trace that part of the development of Article 12 where this Court embarked on the path of evolving criteria by which a corporation could be termed 'other authority' under Article 12.

In Rajasthan Electricity Board v. Mohan Lal, [1967] 3 SCR 377 this Court was called upon to consider whether the Rajasthan Electricity Board was an 'authority' within the meaning of the expression 'other authorities' in Article 12. Bhargava, J. who delivered the judgment of the majority pointed out that the expression 'other authorities' in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any body of persons has authority to issue directions, the dis-

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obedience of which would be publishable as a criminal offence, that would be an indication that the concerned authority is 'State'. Shah, J., who delivered a separate judgment agreeing with the conclusion reached by the majority, preferred to give a slightly different meaning to the expression 'other authorities'. He said that authorities, constitutional or statutory, would fail within the expression "other authorities" only if they are invested with the sovereign power of the State, namely, the power to make rules and regulations which have the force of law. The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the expression "other authorities" if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law.

This test was followed by Ray, C J, in Sukhdev v. Bhagat Ram, [1975] 1 SCC 421. Mathew, J. however, in the same case propounded a broader test. The learned Judge emphasised that the concept of 'State' had undergone drastic changes in recent years and today 'State' could not be conceived of simply as a coercive machinery wielding the thunderbolt of authority; rather it has to be viewed mainly as a service corporation. He expanded on this dictum by stating that the emerging principle appears to be that a public

corporation being an instrumentality or agency of the 'State' is subject to the same constitutional limitations as the 'State' itself. The preconditions of this are two, namely, that the corporation is the creation of the 'State' and that there is existence of power in the corporation to invade the constitutional rights of the individual. This Court in Ram anna Shetty v. International Airport Authority, [1979] 3 SCR 1014 accepted and adopted the rational of instrumentality or agency of State put forward by Mathew, J., and spelt out certain criteria with whose aid such an inference could be made. However, before we come to these criteria we think it necessary to refer to the concern operating behind the exposition of the broader test by Justice Mathew which is of equal relevance to us today, especially considering the fact that the definition under Article 12 is. an inclusive and not an exhaustive definition. That concern is the need to curb arbitrary and unregulated power wherever and howsoever reposed.

In Ramanna D. Shetty v. International Airport Authority (supra) this Court deliberating on the criteria on the basis of which to determine whether a corporation is acting as instrumentality or agency of Government said that it was not possible to formulate an all inclu-

sive or exhaustive test which would adequately answer this question. There is no out and dried formula which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not. The Court said whilst formulating the criteria that analogical aid can be taken from the concept of State Action as developed in the United States wherein the U.S. Courts have suggested that a private agency if supported by extraordinary assistance given by the State may be subject to the same constitutional limitations as the State. It was pointed out that the State's general common law and statutory structure under which its people carry on their private affairs, own property and enter into contracts, each enjoying equality in terms of legal capacity, is not such assistance as would transform private conduct into State Action. "But if extensive and unusual financial assistance is given and the purpose of such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of the Government".

On the question of State control, the Court in R.D. Shetty's case (supra) clarified that some control by the State would not be determinative of the question, since the State has considerable measure of control under its police power over all types of business organisations. But a finding of State financial support plus an unusual degree of control over the management and policies of the corporation might lead to the characterisation of the operation as State Action.

Whilst deliberating on the functional criteria namely, that the corporation is carrying out a governmental function. the Court emphasised that classification of a function as governmental should not be done on earlier day perceptions but on what the State today views as an indispensable part of its activities, for the State may deem it as essential to its economy that it owns and operate a railroad, a mill or an irrigation system as it does to own and operate bridges street lights or a sewage disposal plant. The Court also reiterated in R.D. Shetty's case (supra) what was pointed out by Mathew, J. in Sukhdev v. Bhagatram that "Institutions engaged in matters of high public interest or public functions are by virtue of the nature of the functions performed government agencies. Activities which are too fundamental to the society are by definition too important not to be considered government functions." The above discussion was rounded off by the Court in R.D.

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Shetty's case (supra) by enumerating the following five factors namely, (1) financial assistance given by the State and magnitude of such assistance (2) any other form of assistance whether of the usual kind or extraordinary (3) control of management and policies of the corporation by the State-nature and extent of control (4) State conferred or State protected monopoly status and (5) functions carried out by the corporation, whether public functions closely related to governmental functions, as relevant criteria for determining whether a corporation is an instrumentality or agency of the State or not, though the Court took care to point out that the enumeration was not exhaustive and that it was the aggregate or cumulative effect of all the relevant factors that must be taken as controlling. The criteria evolved by this Court in Ramanna Shetty's case (supra) were applied by this Court in Ajay Hasia v. Khalid Mujib, [1981] 2 SCR 79 where it was further emphasised that:

"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 constitutional law must seek the substance and not the form. Now it is obvious that the Government may through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of judicial persons to carry out its functions. It is really the Government which acts through the instrumentality or agency of the corporation and the juristic veil of corporate personality worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government ..... (for 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 be equality subject to the same limitations".

On the canon of construction to be adopted for interpreting constitutional guarantees the Court pointed out: ".... constitutional guarantees ... should not be allowed to be emasculated in their application by a narrow and constructed judicial interpretation. The Courts should be anxious to enlarge the scope and width of the fundamental

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rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities to the basic obligation of the fundamental rights." In this case the Court also set at rest the controversy as to whether the manner in which a corporation is brought into existence had any relevance to the question whether it is a State instrumentality or agency. The Court said that it is immaterial for the purpose of determining whether a corporation is an instrumentality or agency of the State or not whether it is created by a Statute or under a statute: "the inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or any other similar statute". It would come within the ambit of Article 12, if it is found to an instrumentality or agency of the State on a proper assessment of the relevant factors.

It will thus be seen that this Court has not permitted the corporate device to be utilised as a barrier ousting the constitutional control of the fundamental rights. Rather the Court has held:

"It is dangerous to exonerate corporations from the need to have constitutional conscience, and so that interpretation, language permitting, which makes governmental agencies whatever their main amenable to constitutional limitations must be adopted by the court as against the alternative of permitting them to flourish as an imperium in imperio". Som Prakash v. Union of India, [1981] 1 SCC 449. Taking the above exposition as our guideline, we must now proceed to examine whether a private corporation such as Shriram comes within the ambit of Article 12 so as to be amenable to the discipline of Article 21.

In order to assess the functional role allocated to private corporation engaged in the manufacture of chemicals and fertilisers we need

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to examine the Industrial Policy of the Government and see the public interest importance given by the State to the activity carried on by such private corporation. Under the Industrial Policy Resolution 1956 industries were classified into three categories having regard to the part which the State would play in each of them. The first category was to be the exclusive responsibility of the State. The second category comprised those industries which would be progressively State owned and in which the State would therefore generally take the initiative in establishing new undertakings but in which private enterprise would also be expected to supplement the effort of the State by promoting and development undertakings either on its own or with State participation. The third category would include all the remaining industries and their future development would generally be left to the initiative and enterprise of the private sector. Schedule B to the Resolution enumerated the industries.

Appendix I to the Industrial Policy Resolution, 1948 dealing with the problem of State participation in industry and the conditions in which private enterprise should be allowed to operate stated that there can be no doubt that the State must play a progressively active role in the development of industries. However under the present conditions, the mechanism and resources of the State may not permit it to function forthwith in Industry

as widely as may be desirable. The Policy declared that for some time to come, the State could contribute more quickly to the increase of national wealth by expanding its present activities wherever it is already operating and by concentrating on new units of production in other fields.

On these considerations the Government decided that the manufacture of arms and ammunition, the production and control of atomic energy and the ownership and management of railway transport would be the exclusive monopoly of the Central Government. The establishment of new undertakings in Coal, Iron and Steel, Aircraft manufacture, Ship building, manufacture of telephone telegraph and wireless apparatus and mineral oil were to be the exclusive responsibility of the State except where in national interest the State itself finds it necessary to secure the cooperation of private enterprise subject to control of the Central Government. The policy resolution also made mention of certain basic industries of importance the planning and regulation of which by tile Cent-

ral Government was found necessary in national interest. Among the eighteen industries so mentioned as requiring such Central control. heavy chemicals and fertilisers stood included.

In order to carry out the objective of the Policy Resolution the Industries (Development and Regulation) Act of 1951 was enacted which, according to its objects and reasons, brought under central control the development and regulation of a number of important industries the activities of which affect the country as a whole and the development of which must be governed by economic factors of all India import. Section 2 of the Act declares that it is expedient in the public interest that the Union should take under its control the industries specified in the First Schedule. Chemicals and Fertilisers find a place in the First Schedule as Items 19 and 18 respectively. If an analysis of the declarations in the Policy Resolutions and the Act is undertaken, we find that the activity of producing chemicals and fertilisers is deemed by the State to be an industry of vital public interest, whose public import necessitates that the activity should be ultimately carried out by the State itself, in the interim period with State support and under State control, private corporations may also be permitted to supplement the State effort. The argument of the applicants on the basis of this premise was that in view of this declared

industrial policy of the State, even private corporations manufacturing chemicals and fertilisers can be said to be engaged in activities which are so fundamental to the Society as to be necessarily considered government functions. Sukhdev v. Bhagat Ram, Ramanna Shetty and Ajay Hasia (supra).

It was pointed out on behalf of the applicants that as Shriram is registered under the Industries Development and Regulation Act 1951, its activities are subject to extensive and detailed control and supervision by the Government. Under the Act a licence is necessary for the establishment of a new industrial undertaking or expansion of capacity or manufacture of a new article by an existing industrial undertaking carrying on any of the Scheduled Industries included in the First Schedule of the Act. By refusing licence for a particular unit, the Government can prevent over concentration in a particular region or overinvestment in a particular industry. Moreover, by its power to specify the capacity in the licence it can also prevent overdevelopment of a particular industry if it has already reached target capacity. Section 18 G of the Act empowers the Government to control the supply, distribution, price etc. of the articles manufactured by a scheduled

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industry and under Section 18A Government can assume management and control of an industrial undertaking engaged in a scheduled industry if after investigation it is found that the affairs of the undertaking are being managed in a manner detrimental to public interest and under Section 18AA in certain emergent cases, takeover is allowed even without investigation. Since Shriram is carrying on a scheduled industry, it is subject to this stringent system of registration and licensing. It is also amenable. to various directions that may be issued by the Government from time to time and it is subject to the exercise of the powers of the Government under Sections 18A, and 18G.

Shriram is required to obtain a licence under the Factories Act and is subject to the directions and orders of the authorities under the Act. It is also required to obtain a licence for its manufacturing activities from the Municipal authorities under the Delhi Municipal Act, 1957. It is subject to extensive environment regulation under the Water (Prevention and Control) of Pollution Act, 1974 and as the factory is situated in an air pollution control area, it is also subject to the regulation of the Air (Prevention and Control of Pollution) Act, 1981. It is true that control is not exercised by the Government in relation to the internal management policies of the Company. However, the control is

exercised on all such activities of Shriram which can jeopardize public interest. This functional control is of special significance as it is the potentiality of the fertilizer industry to adversely affect the health and safety of the community and its being impregnated with public interest which perhaps dictated the policy decision of the Government to ultimately operate this industry exclusively and invited functional control. Along with this extensive functional control, we find that Shriram also receives sizable assistance in the shape of loans and overdrafts running into several crores of rupees from the Government through various agencies. Moreover, Shriram is engaged in the manufacture of caustic soda, chlorine etc. Its various units are set up in a single complex surrounded by thickly populated colonies. Chlorine gas is admittedly dangerous to life and' health. If the gas escapes either from the storage tank or from the filled cylinders or from any other point in the course of production, the health and wellbeing of the people living in the vicinity can be seriously affected. Thus Shriram is engaged in an activity which has the potential to invade the right to life of large sections of people. 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 States' power as economic agent, economic entrepreneur and allocator of economic benefits is subject to the limitations of fundamental rights. (Vide

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Eurasian Equipment and Chemicals Ltd. v. State of West Bengal, (1975) 2 SCR 674, Rashbehari Panda v. State, [1983] 3 SCR 374, Ramanna Shetty v. International Airport Authority, (supra) and Kasturilal Reddy v. State of Jammu & Kashmir, [1980] 3 SCR 1338) 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 and which the State ultimately proposes to exclusively run under its industrial policy, not be subject to the same limitations. But we do not propose to decide this question and make any definite pronouncement upon it for reasons which we shall point out later in the course of this judgment. We were during the course of arguments, addressed at great length by counsel on both sides on the American doctrine of State action. The learned counsel elaborately traced the evolution of this doctrine in its parent country. We are aware that in America since the Fourteenth Amendment is available only against the State, the Courts, in order to thwart racial discrimination by private parties, devised the theory of State action under which it was held that wherever private activity

was aided, facilitated or supported by the Slate in a significant measure, such activity took the colour of State action and was subject to the constitutional limitations of the Fourteenth Amendment. This historical context in which the doctrine of State action evolved in the United States is irrelevant for our purpose especially since we have Article 15(2) in our Constitution. But it is the principle behind the doctrine of State aid, control and regulation so impregnating a private activity as to give it the colour of State action that is of interest to us and that also to the limited extent to which it can be Indianized and harmoniously blended with our constitutional jurisprudence. That we in no way consider ourselves bound by American exposition of constitutional law is well demostrated by the fact that in Ramanna Shetty, (supra) this Court preferred the minority opinion of Douglas, J. in Jackson v. Metropolitan Edison Company, 42 L.ed. (2d) 477 as against the majority opinion of Rehnquist, J. And again in Air India v. Nargesh Mirza, [1982] 1 SCR 438 this Court whilst preferring the minority view in General Electric Company Martha v. Gilbert, 50 L.ed. (2d) 343 said that the provisions of the American Constitution cannot always be applied to Indian conditions or to the provisions of our Constitution and whilst some of the principles adumbrated by the American decisions may provide a useful guide, close adherence to those principles while applying them to the provisions of our Constitution is not to be favoured, because the social conditions in our country are different. The learned counsel for Shriram stressed the inapposite-

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ness of the doctrine of State action in the Indian context because, according to him, once an authority is brought within the purview of Article 12, it is State for all intents and purposes and the functional dichotomy in America where certain activities of the same authority may be charaterised as State action and others as private action cannot be applied here in India. But so far as this argument is concerned, we must demur to it and point out that it is not correct to say that in India once a corporation is deemed to be 'authority', it would be subject to the constitutional limitation of fundamental rights in the performance of all its functions and that the appellation of 'authority' would stick to such corporation, irrespective of the functional context.

Before we part with this topic, we may point out that this Court has throughout the last few years expanded the horizon of Article 12 primarily to inject respect for human rights and social conscience in our corporate structure. The purpose of expansion has not been to destroy the raison d'eter of creating corporations but to advance the human rights

jurisprudence. Prima facie we are not inclined to accept the apprehensions of learned counsel for Shriram as well-founded when he says that our including within the ambit of Article 12 and thus subjecting to the discipline of Article 21, those private corporations whose activities have the potential of affecting the life and health of the people, would deal a death blow to the policy of encouraging and permitting private entrepreneurial activity. Whenever a new advance is made in the field of human rights, apprehension is always expressed by the status quosits that it will create enormous difficulties in the way of smooth functioning of the system and affect its stability. Similar apprehension was voiced when this Court In Ramanna Shetty's case (supra) brought public sector corporations within the scope and ambit of Article 12 and subjected them to the discipline of fundamental rights. Such apprehension expressed by those who may be affected by any new and innovative expansion of human rights need not deter the Court from widening the scope of human rights and expanding their reach ambit, if otherwise it is possible to do so without doing violence to the language of the constitutional provision. It is through creative interpretation and bold innovation that the human rights jurisprudence has been developed in our country to a remarkable extent and this forward march of the human rights movement cannot be allowed to be halted by unfounded apprehensions expressed by status quoists. But we do not propose to decide finally at the present stage whether a private corporation like Shriram would fall within the scope and ambit of Article 12, because we have not had sufficient time to consider and reflect on this question in depth. The hearing of this case before us

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concluded only on 15th December 1986 and we are called upon to deliver our judgment within a period of four days, on 19th December 1986. We are therefore of the view that this is not a question on which we must make any definite pronouncement at this stage. But we would leave it for a proper and detailed consideration at a later stage if it becomes necessary to do so.

We must also deal with one other question which was seriously debated before us and that question is as to what is the measure of liability of an enterprise which is engaged in an hazardous or inherently dangerous industry, if by reason of an accident occurring in such industry, persons die or are injured. Does the rule in Rylands v. Fletcher apply or is there any other principle on which the liability can be determined? The rule in Rylands v. Fletcher was evolved in the year 1866 and it provides that a person who for his own

purposes being on to his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril and, if he falls to do so, is prima facie liable for the damage which is the natural consequence of its escape. The liability under this rule is strict and it is no defence that the thing escaped without that person's wilful act, default or neglect or even that he had no knowledge of its existence. This rule laid down a principle of liability that if a person who brings on to his land and collects and keeps there anything likely to do harm and such thing escapes and does damage to another, he is liable to compensate for the damage caused. Of course, this rule applies only to non-natural user of the land and it does not apply to things naturally on the land or where the escape is due to an act of God and an act of a stranger or the default of the person injured or where the thing which escapes is present by the consent of the person injured or in certain cases where there is statutory authority. Vide Halsbury Laws of England, Vol. 45 para 1305. Considerable case law has developed in England as to what is natural and what is non-natural use of land and what are precisely the circumstances in which this rule may be displaced. But it is not necessary for us to consider these decisions laying down the parameters of this rule because in a modern industrial society with highly developed scientific knowledge and technology where hazardous or inherently dangerous industries are necessary to carry out part of the developmental programme. This rule evolved in the 19th Century at a time when all these developments of science and technology had not taken place cannot afford any guidance in evolving any standard of liability consistent with the constitutional norms and the needs of the present day economy and social structure. We need not feel inhibited by this rule which was evolved in this context of a totally different kind of

economy. Law has to grow in order to satisfy the needs of the fast changing society and keep abreast with the economic developments taking place in the country. As new situations arise the law has to be evolved in order to meet the challenge of such new situations. Law cannot afford to remain static. We have to evolve new principles and lay down new norms Which would adequately deal with the new problems which arise in a highly industrialised economy. We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for the matter of that in any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build up our own

jurisprudence and we cannot countenance an argument that merely because the new law does not recognise the rule of strict and absolute liability in cases of hazardous or dangerous liability or the rule as laid down in Rylands v. Fletcher as is developed in England recognises certain limitations and responsibilities. We in India cannot hold our hands back and I venture to evolve a new. principle of liability which English courts have not done. We have to develop our own law and if we find that it is necessary to construct a new principle of liability to deal with an unusual situation which has arisen and which is likely to arise in future on account of hazardous or inherently dangerous industries which are concommitant to an industrial economy, there is no reason why we should hesitate to evolve such principle of liability merely because it has not been so done in England. We are of the view that an enterprise which is engaged in a hazardous or inherently dangerous industry which poses a potential threat to the health and safety of the persons working in the factory and residing in the surrounding areas owes an absolute and nondelegable duty to the community to ensure that no harm results to anyone on account of hazardous or inherently dangerous nature of the activity which it has undertaken. The enterprise must be held to be under an obligation to provide that the hazardous or inherently dangerous activity in which it is engaged must be conducted with the highest standards of safety and if any harm results on account of such activity, the enterprise must be absolutely liable to compensate for such harm and it should be no answer to the enterprise to say that it had taken all reasonable care and that the harm occurred without any negligence on its part. Since the persons harmed on account of the hazardous or inherently dangerous activity carried on by the enterprise would not be in a position to isolate the process of operation from the hazardous preparation of substance or any other related element that caused the harm must be held strictly liable for causing such harm as a part of the social cost for carrying on the hazardous or

inherently dangerous activity. If the enterprise is permitted to carry on an hazardous or inherently dangerous activity for its profit, the law must presume that such permission is conditional on the enterprise absorbing the cost of any accident arising on account of such hazardous or inherently dangerous activity as an appropriate item of its overheads. Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise engaged in such hazardous or inherently dangerous activity indemnifies all those who suffer on account of the carrying on of such hazardous

or inherently dangerous activity regardless of whether it is carried on carefully or not. This principle is also sustainable on the ground that the enterprise alone has the resource to discover and guardagainst hazards or dangers and to provide warning against potential hazards. We would therefore hold that where an enterprise is engaged in a hazardous or inherently dangerous activity and harm results to anyone on account of an accident in the operation of such hazardous or inherently dangerous activity resulting, for example, in escape of toxic gas the enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-a-vis the tortious principle of strict liability under the rule in Rylands v. Fletcher (supra). We would also like to point out that the measure of compensation in the kind of cases referred to in the preceding paragraph must be correlated to the magnitude and capacity of the enterprise because such compensation must have a deferent effect. The larger and more prosperous the enterprise, the greater must be the amount of compensation payable by it for the harm caused on account of an accident in the carrying on of the hazardous or inherently dangerous activity by the enterprise.

Since we are not deciding the question as to whether Shriram is an authority within the meaning of Article 12 so as to be subjected to the discipline of the fundamental right under Article 21, we do not think it would be justified in setting up a special machinery for investigation of the claims for compensation made by those who allege that they have been the victims of oleum gas escape. But we would direct that Delhi Legal Aid and Advice Board to take up the cases of all those who claim to have suffered on account of oleum gas and to file actions on their behalf in the appropriate court for claiming compensation against Shriram. Such actions claiming compensation may be filed by the Delhi Legal Aid and Advice Board.within two months from

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today and the Delhi Administration is directed to provide the necessary funds to the Delhi Legal Aid and Advice Board for the purpose of filing and prosecuting such actions. The High Court will nominate one or more Judges as may be necessary for the purpose of trying such actions so that they may be expeditiously disposed of. So far as the issue of relocation and other issues are concerned the writ petition will come up for hearing on 3rd February, 1987.

A.P.J. Petition disposed of.