



## Moot Problem

- [1.] The Republic of Aryabharta is a country in South- Asia, an emerging economy having a population of over 100 million people. It has a highly diversified economy, having rich biodiversity, flora, and fauna. Presently it is one of the favourite destinations for FDI and other economic investments for developed nations.
- [2.] The Republic of Aryabharta was a British colony till it got independence in year 1945. The constitution- framers of Republic of Aryabharta, mindful of socio- economic conditions of the country and realizing the aspiration of its citizens in an independent country – have framed a constitution which has not only guaranteed certain inalienable fundamental rights, the principles of welfare state but also outlines the objectives and vision of socio- economic development in terms of certain Directive Principles of State Policy. The Constitutional, legal and policy framework of Republic of Aryabharta are similar to the Republic of India.
- [3.] The economic growth of Aryabharta, had been largely state controlled and through the public sector units. The successive Govts. of Aryabharta have taken all the measures to nationalize and promote the development of those economic sectors which were of public importance and had a significant role in delivering large scale welfare services.
- [4.] Just after Independence, in year 1947, the Govt. of Aryabharta nationalized “Radio Aryabharta and Modern Communication Ltd.” (“**RAMCL**”) which was mainly operating in the overseas communication and international telecommunication. Subsequently, RIMCL was merged with the Department of Telecommunication along with its employees. However, due to growing demand and technological developments, the Govt. of Aryabharta created a new „State“ run corporate entity namely Aryabharta International Communication Limited“ (“**AOCL**”) in year 1981 which had a kind of monopoly in respect of “International Long Distance Service“ i.e. ILDS and international telecommunication services.
- [5.] In last two decades, due to change in global economic governance – the Republic of Aryabharta introduced a series of economic reforms under the Banner of New Economic Policy (**NEP**) 1993, to infuse a kind of economic efficiency, as a measure to curb the



menace of corruption and bureaucratic control, through license system which ensured the scornful nomenclature of License Raj, so as to foster economic prosperity and development of the people.

[6.] ‘ABC Corporation Pvt. Ltd.’ is a corporate entity of Aryabharta, having its existence since the British period. The company has an unparalleled growth story in Independent Aryabharta and has its presence in all the key economic sectors with an unparalleled commitment to Corporate Social Responsibility. ABC Corp. Ltd. has one of its motto to be the „partner in economic development with a social commitment“ and share the „responsibilities with values“.

[7.] The **NEP- 1993** not only envisaged private investments in sectors of socio- economic importance like Education, Telecommunication, Roads, Retails, Housing, Energy (including Oil & Natural Gas, Coal) etc. but also opened the doors for private investment in sectors of national & strategic importance like defence and aerospace, Telecommunication, Nuclear Energy, Space Technology and Applications etc. The NEP- 1993 also mooted Public- Private Partnership (PPP) as a preferred business model for the economic reforms. The political parties and their leaders opposed the Economic Reforms, expressed their concern about the exploitation and vulnerability which exists due to peculiar socio- economic scenario in Aryabharta. There were political agitations and wide protest across the Republic of Aryabharta against the economic reform introduced therein. In pursuance of NEP- 1993, the republic of Aryabharta started disinvesting wide range of Public Sector Units (PSU) which were promoted and controlled by „State“ including **POCL**.

[8.] In year 2000, the Govt. of Aryabharta divested itself of the shares of POCL in favour of a group of companies floated by ABC Corporation Limited after following the due process in accordance with its disinvestment policy. The present shareholding percentage in the POCL is as follows:-

Sr. No.	POCL	% of shares
1.	Central Govt. including Nominees of President of Aryabharta	31





2.	Shares Allotted against employees stock option on the date of disinvestment	2.21
3.	RST Investment corporation (a subsidiary of ABC Corp.)	26.41
4.	Financial institutions promoted by ABC Corp.	16.63
5.	Foreign Financial Institution	10.86
6.	Aryabharta National Banks	0.79
7.	Foreign Companies (Arms of ABC Corp.)	13.10

[9.] However, considering the present composition of share- holding, the Govt. of Aryabharta still remains the largest single stakeholder as indicated above, however, considering the overall share composition- the management of the corporation has been transferred to the ABC Corporation. As part of disinvestment package, the new management is not only the custodian of shares of **POCL** but all the infrastructural components including spectrum allocated for the international communication, office premises, laboratories, communication centers have been transferred into its custody. Thus, Placing it in the shoe of „State“.

[10.] To protect its interest of strategic importance, the Share Purchase Agreement further mandates that the any strategic partner wishes to sell off the stakes in **POCL**, it is not free for the strategic partner to sell off the same in open market, rather the Govt. has a first right to refuse on such future sell of shares.

[11.] The existing employees of **POCL** including higher officials at management level were absorbed and security of services was guaranteed under the share-holding agreement as well as share purchase agreement that the employee should not be retrenched within a period of 3 years from the disinvestment.

[12.] However, an Office Memorandum (OM) dated 13<sup>th</sup> August 2001 issued by the Ministry of Personnel, Public Grievances and Pension (Dept. of Pension & Pensioners“ welfare), Govt. of Aryabharta states following on the issue of job security specific to the employees of **POCL** as:-



*“.....In case the Govt. disinvests its equity in any Public Sector units or Autonomous Body to the extent of 51% or more, it shall specify adequate safeguards for protecting the interests of the absorbed employees of PSUs or Autonomous Bodies”.*

- [13.] Similarly, another recommendation dated 03<sup>rd</sup> May 2001 by the Ministry of Social Justice and Empowerment, Govt. of Aryabharta states following on the issue of social security and reservation issues as follows:-

*“... As increasingly, the Public Sector Units and Govt. enterprises are being disinvested; altering the very nature of corporation from Public to private; nevertheless, the Govt. remains a key stakeholder in the disinvested entity, it is desirable to have a policy of uniform affirmative action in order to promote the welfare of backwards class of citizens. It is constitutional mandate to have an egalitarian society and extend the benefits of reservations in the employment where the ‘State’ continues to hold more than 25 % of stakes in tune with constitutional objectives.”*

- [14.] Prior to disinvestment, the employees of **POCL** were duly appointed by the Aryabharta Public Service Commission; following the due process of appointment. As POCL was a public sector unit, the affirmative actions mainly the reservation in public employment and consequential benefits were duly followed in tunes with the Constitutional objectives of Aryabharta.

- [15.] In year 2009, The new Management of **POCL** namely ABC Corp. Limited, has terminated the employment of 20 managerial employees (who were selected by the Aryabharta Public Service Commission and appointed by the President of Aryabharta) after paying 3 months’ salary in lieu of notice period terming their employment as merely contractual. Majority of the employees whose services has been terminated belong to backward class of citizens; however, it is not the case that the service of all the employees from that category has been terminated.

- [16.] Being aggrieved by this action of new management, employees formed an association namely “ABC Shoshit Employees Welfare Association” and approached the High Court under the writ jurisdiction alleging discrimination by the **POCL & ABC Corp. Ltd** and seeking reinstatement and specific enforcement of OM dated 13<sup>th</sup> August 2001 against





the Govt. of Aryabharta. The High Court in Aryabharta has dismissed the WP under Art. 226 of the Constitution with a conclusion that after disinvestment, **POCL & its new management ABC Corp. Ltd.** is not amenable to writ jurisdiction and termed the relationship as merely contractual in nature. The employees have preferred a Special Leave to Appeal before the Supreme Court of Aryabharta against the order of High Court, wherein the Leave has been granted by it.

[17.] Due to recent wave of privatization, disinvestment of the PSUs and new model of economic growth dominated by the idea of PPP- there has been a wide range of discussion among the academicians, policy makers and at political level so as to protect the constitutional fabric of Aryabharta and keep the spirit alive. Numerous draft papers and academic writings relating to “Contracting out of essential Govt./ public functions” in the new economic era and its impact on the rights and liberties of citizens has triggered a call for new approach in the Public Law.

[18.] The diminishing gap between the “public- private function” has triggered a new debate in Aryabharta and a Bill was also introduced in the parliament to clarify the meaning of “Public Function viz a viz Other Authorities” by one of the regional political party named as “Social Justice Party”. [See, ANNEXURE BILL].

[19.] Those employees belonging to backward class of citizens (Managerial and Non- Managerial) whose services have not been terminated by the new management of POCL formed an association named as **All Aryabharta Backward Class (affected by disinvestment) Employee Association**. All Aryabharta Backward Class (affected by disinvestment) Employee Association has approached the Supreme Court of Aryabharta seeking the enforcement of their constitutional rights (in terms of affirmative action) claiming it as a part of legitimate expectation, specific enforcement of recommendation dated 03<sup>rd</sup> May 2001 by the Ministry of Social Justice and Empowerment, Govt. of Aryabharta by way of a Writ Petition under Article 32 of the Constitution.

[20.] Both the SLP & WP has been clubbed together by the Supreme Court of Aryabharta which is being opposed by the ABC Corp. Ltd. & new management of POCL and scheduled for final hearing on 18 August 2013.



## ANNEXURE BILL

**A**

**BILL**

**To**

Clarify the meaning of “Public Function viz a viz Other Authorities” for the purpose of Article 12 & 226 of the Constitution of Aryabharta.

Be it enacted in the 63<sup>rd</sup> year of the Republic of Aryabharta as follows:-

### **1. Factors to be taken into account when determining whether function performed by Other Authorities is a public function**

For the purposes of Article 12 & 226 of the Constitution of Aryabharta, the factors which must be taken into account in determining whether a function is of public nature include-

- (a) The extent to which the state has assumed responsibility for the function in question;
- (b) The role and responsibility of the state in relation to the subject- matter in question;
- (c) The nature and extent of public interest in the function in question;
- (d) The nature and extent of any statutory power or duty in relation to the function in question;
- (e) The extent to which the State, directly or indirectly, regulates, supervises or inspects the performance of the function in question;
- (f) The extent of the risk that improper performance of the function might violate provision of Part III & Part IV of the Constitution.

### **2. Performance of Public Function by pure Private Body**

For the avoidance of any doubt, a function of public nature includes a public function which is required or enabled to be performed wholly or partially at public expenses by a purely private body, irrespective of –

- (a) The legal status of the person who perform the function, or



(b) Whether the person performs the function by reason of a contractual or other agreement or arrangement.

### 3. Short Title, commencement and extent

(1) This Act may be called as “Meaning of Public Function Act” 2013.

(2) The Act extends to whole of Aryabharta and shall come into force on such date as notified in Gazette of Aryabharta.

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