

# **Pradeep Kumar Biswas & Ors vs Indian Institute Of Chemical Biology & ... on 16 April, 2002**

**Author: R.C. Lahoti**

**Bench: R.C. Lahoti, Doraiswamy Raju**

CASE NO.:

Appeal (civil) 992 of 2002

PETITIONER:

PRADEEP KUMAR BISWAS & ORS.

Vs.

RESPONDENT:

INDIAN INSTITUTE OF CHEMICAL BIOLOGY & ORS.

DATE OF JUDGMENT: 16/04/2002

BENCH:

R.C. Lahoti & Doraiswamy Raju

JUDGMENT:

R.C. Lahoti, J.

(for self and on behalf of Doraiswamy Raju, J.) We have had the advantage of reading the judgment proposed by our learned sister Ruma Pal, J.. With greatest respect to her, we find ourselves not persuaded to subscribe to her view overruling Sabhajit Tewary's case and holding Council for Scientific and Industrial Research (CSIR) 'the State' within the meaning of Article 12 of the Constitution. The development of law has travelled through apparently a zig-zag track of judicial pronouncements, rhythmically traced by Ruma Pal, J. in her judgment. Of necessity, we shall have to retread the track, for, we find that though the fundamentals and basic principles for determining whether a particular body is 'the State' or not may substantially remain the same but we differ in distributing the emphasis within the principles in their applicability to the facts found. We also feel that a distinction has to be borne in mind between an instrumentality or agency of 'the State' and an authority includible in 'other authorities'. The distinction cannot be obliterated.

Article 12 of the Constitution reads as under:

"12. In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."

This definition is for the purpose of attracting applicability of the provisions contained in Part III of the Constitution dealing with fundamental rights. It is well-settled that the definition of 'the State' in Article 12 has nothing to do with Articles 309, 310 and 311 of the Constitution which find place in Part XIV. Merely because an entity is held to be the State within the meaning of Article 12, its employees do not ipso facto become entitled to protection of Part XIV of the Constitution.

Dr. B.R. Ambedkar explaining the scope of Article 12 and reason why this Article was placed in the Chapter on Fundamental Rights so spoke in the Constituent Assembly :

"The object of the fundamental rights is two-fold. First, that every citizen must be in a position to claim those rights. Secondly, they must be binding upon every authority I shall presently explain what the word "authority" means upon every authority which has got either the power to make laws or the power to have discretion vested in it. Therefore, it is quite clear that if the Fundamental Rights are to be clear, then they must be binding not only upon the Central Government, they must not only be binding the Provincial Government, they must not only be binding upon the Governments established in the Indian States, they must also be binding upon District Local Boards, Municipalities, even village panchayats and taluk boards, in fact, every authority which has been created by law and which has got certain power to make laws, to make rules, or make bye-

laws.

If that proposition is accepted and I do not see anyone who cares for Fundamental Rights can object to such a universal obligation being imposed upon every authority created by law then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as "the State", as we have done in article 7; or, to keep on repeating every time, "the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority". It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words".

(1948 (Vol.VII) CAD 610) [emphasis supplied] Thus the framers of the Constitution used the word "the State"

in a wider sense than what is understood in the ordinary or narrower sense. So far as 'other authorities' are concerned they were included subject to their satisfying the test

of being 'within the territory of India' or being 'under the control of the Government of India'. It is settled that the expression 'under the control of the Government of India' in Article 12 does not qualify the word 'territory'; it qualifies 'other authorities'.

The terms 'instrumentality' or 'agency' of the State are not to be found mentioned in Article 12. It is by the process of judicial interpretation nay, expansion - keeping in view the sweep of Article 12 that they have been included as falling within the net of Article 12 subject to satisfying certain tests. While defining, the use of 'includes' suggest what follows is not exhaustive. The definition is expansive of the meaning of the term defined. However, we feel that expanding dimension of 'the State' doctrine through judicial wisdom ought to be accompanied by wise limitations else the expansion may go much beyond what even the framers of Article 12 may have thought of.

Instrumentality, Agency, Authority meaning of It will be useful to understand what the terms - instrumentality, agency and authorities mean before embarking upon a review of judicial decisions dealing with the principal issue which arises for our consideration.

Black's Law Dictionary (Seventh Edition) defines 'instrumentality' to mean "a means or agency through which a function of another entity is accomplished, such as a branch of a governing body." 'Agency' is defined as "a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions." Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; 'instrumentality' includes 'means' also, which 'agency' does not, in its meaning. 'Quasi- governmental agency' is "a government sponsored enterprise or Corporation (sometimes called a government-controlled corporation)". Authority, as Webster Comprehensive Dictionary (International Edition) defines, is "the person or persons in whom government or command is vested; often in the plural". The applicable meaning of the word "authority" given in Webster's Third New International Dictionary, is 'a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise'. This was quoted with approval by Constitution Bench in RSEB's case (infra) wherein the Bench held "This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Art.12 of the Constitution". (emphasis added) With the pronouncements in N. Masthan Sahib Vs. The Chief Commissioner, Pondicherry and Anr. (1962) Supp.1 SCR 981 and K.S. Ramamurthy Reddiar Vs. Chief Commissioner, Pondicherry and Anr. (1964) 1 SCR

656 it is settled that Article 12 of the Constitution has to be so read :

"12. In this part, unless the context otherwise requires, the 'State' includes

(i) the Government and Parliament of India,

(ii) the Government and the Legislature of each State,

(iii) (a) all local or other authorities within the territory of India,

(b) all local or other authorities under the control of the Government of India."

The definition of the State as contained in Article 12 is inclusive and not conclusive. The net of Article 12 has been expanded by 'progressive' judicial thinking, so as to include within its ken several instrumentalities and agencies performing State function or entrusted with State action. To answer the principal question in the context in which it has arisen, incidental but inseparable issues do arise: Wide expansion but how far wide? Should such wide expansion be not subject to certain wise limitations? True, the width of expansion and the wisdom of limitations both have to be spelled out from Article 12 itself and the fundamentals of constitutional jurisprudence.

We now deal with a series of decisions wherein tests were propounded, followed (also expanded) and applied to different entities so as to find out whether they satisfied the test of being 'the State'.

A review of judicial opinion Though judge-made law is legend on the issue, we need not peep too much deep in the past unless it becomes necessary to have a glimpse of a few illuminating points thereat. It would serve our purpose to keep ourselves confined, to begin with, to discerning the principles laid down in Rajasthan State Electricity Board, Jaipur Vs. Mohal Lal and Ors. (1967) 3 SCR 377, Sukhdev Singh and Ors. Vs. Bhagatram Sardar Singh Raghuvanshi and Anr. (1975) 1 SCC 421, Ramana Dayaram Shetty Vs. The International Airport Authority of India and Ors. (1979) 3 SCC 489, Ajay Hasia etc. Vs. Khalid Mujib Sehravardi and Ors. etc. (1981) 1 SCC 722 and Som Prakash Rekhi Vs. Union of India and Anr. (1981) 1 SCC 449 which have come to be known as landmarks on the State conceptualisation . Out of these five decisions, R.D. Shetty and Som Prakash are three-Judges Bench decisions; the other 3 are each by Constitution Bench of five-Judges.

The Constitution Bench decision in Rajasthan State Electricity Board (RSEB)'s case was delivered by a majority of 4:1. V. Bhargava, J. spoke for himself and K. Subba Rao, C.J. and M. Shelat and G.K. Mitter, JJ. J.C. Shah, J. delivered his dissenting opinion. We will refer to majority opinion only. The Court quoted the interpretation placed by Ayyangar, J. from the pronouncement of seven-Judges Bench of this Court in Smt. Ujjam Bai Vs. State of Uttar Pradesh and Anr. (1963) 1 SCR 778 that the words 'other authorities' employed in Article 12 are of wide amplitude and capable of comprehending every authority created under a statute and though there is no characterisation of the nature of the "authority" in the residuary clause of Article 12 it must include every authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duties to make decisions in order to implement those laws. The

Court refused to apply the doctrine of ejusdem generis for interpretation of the 'other authorities' in Article 12. "Other authorities" in Article 12 include, held the Court, "all constitutional or statutory authorities on whom powers are conferred by law" without regard to the fact that some of the powers conferred may be for the purpose of carrying on commercial activities or promoting the educational and economic interests of the people. Regard must be had (i) not only to the sweep of fundamental rights over the power of the authority, (ii) but also to the restrictions which may be imposed upon the exercise of certain fundamental rights by the authority. This dual phase of fundamental rights would determine "authority". Applying the test formulated by it to Rajasthan State Electricity Board, the Court found that the Board though it was required to carry on some activities of the nature of trade or commerce under the Electricity Supply Act, yet the statutory powers conferred by the Electricity Supply Act on the Board included power to give directions, the disobedience of which is punishable as a criminal offence and therefore the Board was an authority for the purpose of Part III of the Constitution.

Praga Tools Corporation Vs. C.V. Imanuel and Ors. (1969) 1 SCC 585 may not be of much relevance. The question posed before the Court was not one referable to Article 12 of the Constitution. The question was whether a prayer seeking issuance of a mandamus or an order in the nature of mandamus could lie against a company incorporated under the Companies Act wherein the Central and the State Governments held respectively 56 and 32 per cent shares. The two-Judge Bench of this Court held that the company was a separate legal entity and could not be said to be either a government Corporation or an industry run by or under the authority of the Union Government. A mandamus lies to secure the performance of a public or statutory duty in the performance of which the petitioner has a sufficient legal interest. A mandamus can issue to an official or a society to compel him to carry out the terms of the Statute under or by which the society is constituted or governed and also to companies or Corporations to carry out duties placed on them by the Statute authorizing their undertaking. A mandamus would also lie against a company constituted by a Statute for the purpose of fulfilling public responsibilities. The Court held that the company being a non- statutory body with neither a statutory nor a public duty imposed on it by a Statute, a writ petition for mandamus did not lie against it. The limited value of this decision, relevant for our purpose, is that because a writ of mandamus can issue against a body solely by this test it does not become 'State' within the meaning of Article 12.

In Sukhdev Singh & Ors. Vs. Bhagatram Sardar Singh Raghuvanshi and another (supra), question arose whether Oil and Natural Gas Commission, the Industrial Finance Corporation and Life Insurance Corporation are 'authorities' within the meaning of Article

12. The case was decided by a majority of 4:1. A.N. Ray, CJ speaking for himself and on behalf of Y.V. Chandrachud and A.C. Gupta, JJ. held that all the three were statutory Corporations, i.e., given birth by Statutes. The circumstance that these statutory bodies were required to carry on some activities of the nature of trade or commerce did not make any difference. The Life Insurance Corporation is (i) an agency of the Government (ii) carrying on the exclusive business of Life Insurance (i.e. in monopoly), and (iii) each and every provision of the Statute creating it showed in no uncertain terms that the Corporation is the voice and the hands of the Central Government. The Industrial Financial Corporation is in effect managed and controlled by the Central Government,

citizens cannot be its shareholder. ONGC (i) is owned by the Government, (ii) is a statutory body and not a company and (iii) has the exclusive privilege of extracting petroleum. Each of the three, respectively under the three Acts under which they are created, enjoy power to do certain acts and to issue directions obstruction in or breach whereof is punishable as an offence. These distinguish them from a mere company incorporated under the Indian Companies Act. The common features of the three are (i) rules and regulations framed by them have the force of law, (ii) the employees have a statutory status, and (iii) they are entitled to declaration of being in employment when the dismissal or removal is in contravention of statutory provisions. The learned Chief Justice added, by way of abundant caution, that these provisions did not however make the employees as servants of the Union or the State though the three statutory bodies are authorities within the meaning of Article 12 of the Constitution.

Mathew, J. recorded his separate concurring opinion. As to ONGC he hastened to arrive at a conclusion that the Commission was invested with sovereign power of the State and could issue binding directions to owners of land and premises, not to prevent employees of the Commission from entering upon their property if the Commission so directs. Disobedience of its directions is punishable under the relevant provisions of the Indian Penal Code as the employees are deemed to be public servants. Hence the Commission is an authority. As to the other two Corporations, viz., LIC and IFC, Mathew, J. entered into a short question and began by observing that in recent years the concept of State has undergone drastic change.

"Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority". Having reviewed some decisions of United States and English decisions and some other authorities, he laid down certain principles with which we will deal with a little later and at appropriate place. He observed that institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the function performed by them, governmental agencies. He noticed the difficulty in separating vital government functions from non-governmental functions in view of the contrast between governmental activities which are private and private activities which are governmental. For holding Life Insurance Corporation "the State" he relied on the following features : (i) the Central Government has contributed the original capital of the Corporation, (ii) part of the profit of the Corporation goes to Central Government, (iii) the Central Government exercises control over the policy of the Corporation, (iv) the Corporation carries on a business having great public importance, and (v) it enjoys a monopoly in the business. As to Industrial Financial Corporation he relied on the circumstances catalogued in the judgment of A.N. Ray, J. The common feature of the two Corporations was that they were instrumentalities or agencies of the State for carrying on business which otherwise would have been run by the State departmentally and if the State had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be "state actions". At the end Mathew, J. made it clear that he was expressing no opinion on the question whether private Corporations or other like organizations though they exercise power over their employees which

might violate their fundamental rights would be the State within the meaning of Article 12. What is 'state action' and how far the concept of 'state action' can be expanded, posing the question, Mathew J. answered "...it is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State." So also commenting on the relevance of 'state help' and 'state control' as determinative tests, Mathew, J. said "It may be stated generally that State financial aid alone does not render the institution receiving such aid a state agency. Financial aid plus some additional factor might lead to a different conclusion. A mere finding of state control also is not determinative of the question, since a state has considerable measure of control under its police power over all types of business operations."

Alagiriswami, J. recorded a dissenting opinion which however we propose to skip over. It is pertinent to note that the dispute in Sukhdev Singh Vs. Bhagat Ram was a service dispute and the employees were held entitled to a declaration of being in employment when their dismissal or removal was in contravention of statutory provisions; the rules and regulations framed by corporations or commission were found having the force of law, being delegated legislation and these statutory bodies were held to be 'authorities' within the meaning of Article 12.

In Ramanna Dayaram Shetty Vs. The International Airport Authority of India & Ors. (supra), the dispute related to trends within the domain of administrative law. A question arose whether International Airport Authority of India (IA, for short) was within the scope of 'other authorities' in Article 12 so as to be amenable to Article 14 of the Constitution. P.N. Bhagwati, J. who delivered the judgment for the three-Judge Bench stated the ratio of Rajasthan State Electricity Boards case, in these words :

"The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of 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 consequence or it has the sovereign power to make rules and regulations having the force of law".

He then referred to what he termed as a 'broader test' laid down by Mathew, J. in Sukhdev Singh's case and said that judgment by Mathew, J. provided 'one more test and perhaps a more satisfactory one' for determining whether a statutory corporation, body or other authority falls within the definition of 'the State' and the test is \_\_\_\_ "If a statutory corporation, body or other authority is an instrumentality or agency of government, it would be an authority and therefore 'the State' within the meaning of the expression in Article 12." Having minutely examined the provisions of the International Airport Authority Act, 1971 he found out the following features of IA :- (i) The

Chairman and Members are all persons nominated by the Central Government and Central Government has power to terminate the appointment or remove them; (ii) The Central Government is vested with the power to take away the management of any airport from the IA; (iii) The Central Government has power to give binding directions in writing on questions of policy; (iv) The capital of IA needed for carrying out its functions is wholly provided by Central Government;

(v) The balance of net profit made by IA, after making certain necessary provisions, does not remain with the IA and is required to be taken over to the Central Government; (vi) The financial estimates, expenditure and programme of activities can only be such as approved by Central Government; (vii) The Audit Accounts and the Audit Report of IA, forwarded to the Central Government, are required to be laid before both Houses of Parliament; (viii) It was a department of the Central Government along with its properties, assets, debts, obligations, liabilities, contracts, cause of action and pending litigation taken over by the IA; (ix) IA was charged with carrying out the same functions which were being carrying out by the Central Government; (x) The employees and officials of IA are public servants and enjoy immunity for anything done or intended to be done, in good faith, in pursuance of the Act or any rules or regulations made by it; (xi) IA is given (delegated) power to legislate and contravention of certain specified regulations entails penal consequences. Thus, in sum, the IA was held to be an instrumentality or agency of the Central Government falling within the definition of the State both on the narrower view propounded in the judgment of A.N. Ray, CJ and broader view propounded by Mathew, J. in *Sudhdev Singh's case*.

*Ajay Hasia etc. v. Khalid Mujib Sehravardi and Ors. etc.* (supra), is a Constitution Bench judgment wherein P.N. Bhagwati, J. spoke for the Court. The test which he had laid down in *Ramanna's case* were summarized by him as six in number and as under:

- "1. One thing is clear that if the entire share capital of the Corporation is held by Government it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government.
2. Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character.
3. It may also be a relevant factor whether the corporation enjoys monopoly status which is the State conferred or State protected.
4. Existence of "deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality".
5. If the functions of the Corporation of public importance and closely related to government functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government.



6. "Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of Government."

The footnote to the tests, as put by him, is "if on a consideration of all these relevant factors it is found that the corporation is an instrumentality or agency of government, it would, be an authority, and therefore, 'the State' within the meaning of Article 12. Bhagwati, J. placed a prologue to the above said tests emphasizing the need to use care and caution, "because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realized that it should not be stretched so far as to bring in every autonomous body which has some nexus with the Government within the sweep of the expression. A wide enlargement of the meaning must be tempered by a wise limitation."

In *Ajay Hasia*, the 'authority' under consideration was a society registered under the Jammu & Kashmir Registration of Societies Act, 1898, administering and managing the Regional Engineering College, Srinagar. The College was sponsored by the Government of India. The prominent features of the society indicated complete financing and financial control of the Government, complete administrative control over conducting of the affairs of the society and administration and assets of the College being taken over by the State Government with the prior approval of the Central Government. These are some of the material features. Some of the observations made by the Court during the course of its judgment are pertinent and we proceed to notice them quickly. The society could not be equated with the Government of India or the Government of any State nor could it be said to be 'local authority', and therefore, should have come within the expression of 'other authorities' to be 'the State'. The Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. With the enlargement of governmental activities, specially those in the field of trade and commerce and welfare, corporation is most resourceful legal contrivance resorted to frequently by the Government. Though a distinct juristic entity came into existence because of its certain advantages in the field of functioning over a department of the Government but behind the formal ownership cast in the corporate mould, the reality is very much the deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the Corporation and the juristic veil of corporate personality is worn for the purpose of convenience of management and administration which cannot be allowed to obliterate the true nature of the reality behind which is the Government. Dealing at length with the corporate contrivance, the Court summed up its conclusion by saying that if a Corporation is found to be a mere agency or surrogate of the Government, 3 tests being satisfied viz., (i) in fact, owned by the Government, (ii) in truth, control by the Government, and (iii) in effect, an incarnation of the Government, then the Court would hold the Corporation to be Government, and therefore, subject to constitutional limitations including for enforcement of fundamental rights. The Court went on to say that where a Corporation is an instrumentality or agency of the Government, it must be held to be an 'authority' for Article 12.

Here itself we have few comments to offer. Firstly, the distinction between 'instrumentality and agency' on the one hand, and 'authority (for the purpose of 'other authorities')' on the other, was totally obliterated. In our opinion, it is one thing to say that if an entity veiled or disguised as a

Corporation or a society or in any other form is found to be an instrumentality or agency of the State then in that case it will be the State itself in narrower sense acting through its instrumentality or agency and therefore, included in 'the State' in the wider sense for the purpose of Article 12. Having found an entity whether juristic or natural to be an instrumentality or agency of the State, it is not necessary to call it an 'authority'. It would make a substantial difference to find whether an entity is an instrumentality or agency or an authority. Secondly, *Ajay Hasia* was the case of a registered society; it was not an appropriate occasion for dealing with corporations or entities other than society. On the inferences drawn by reading of the Memorandum of Association of the society and rules framed thereunder, and subjecting such inferences to the tests laid down in the decision itself, it was found that the society was an instrumentality or agency of the State and on tearing the veil of society what was to be seen was the State itself though in disguise. It was not thereafter necessary to hold the society an 'authority' and proceed to record "that the society is an instrumentality or the agency of the State and the Central Government and it is an 'authority' within the meaning of Article 12", entirely obliterating, the dividing line between 'instrumentality or agency of the State' and 'other authorities'. This has been a source of confusion and misdirection in thought process as we propose to explain a little later. Thirdly, though six tests are laid down but there is no clear indication in the judgment whether in order to hold a legal entity the State, all the tests must be answered positively and it is the cumulative effect of such positive answers which will solve the riddle or positive answer to one or two or more tests would be enough to find out a solution. It appears what the court wished was reaching a final decision on an overall view of the result of the tests. Compare this with what was said by Bhagwati, J. in *Ramanna's* case. We have already noticed that in *Ajay Hasia*, Bhagwati, J. has in his own words summarized the test laid down by him in *Ramanna's* case. In *Ramanna's* case he had said that the question whether a corporation is governmental instrumentality or agency would depend on a variety of factors which defy exhaustive enumeration and moreover even amongst these factors described in *Ramanna's* case "the Court will have to consider the cumulative effect of these various factors and arrive at its decision." "It is the aggregate or cumulative effect of all the relevant factors that is controlling".

Criticism of too broad a view taken of the scope of the State under Article 12 in *Ramanna's* case invited some criticism which was noticed in *Som Prakash Rekhi's* case (*infra*). It was pointed out that the observations in *Ramanna's* case spill over beyond the requirements of the case and must be dismissed as obiter; that IA is a Corporation created by a statute and there was no occasion to go beyond the narrow needs of the situation and expand the theme of the State in Article 12 vis--vis government companies, registered society, and what not; and that there was contradiction between *Sukhdev Singh's* case and *Ramanna's* case.

On 13.11.1980, the Constitutional Bench presided over by Y.V. Chandrachud, C.J. and consisting of P.N. Bhagwati, V.R. Krishna Iyer, S. Murtaza Fazal Ali and A.D. Koshal, JJ. delivered the judgment in *Ajay Hasia's* case, speaking through P.N. Bhagwati, J.. It is interesting to note that on the same day another three-Judges Bench consisting V.R. Krishna Iyer, O. Chinnappa Reddy and R.S. Pathak, JJ. delivered judgment in *Som Prakash Rekhi v. Union of India* and another (*supra*). V.R. Krishna Iyer, J. speaking for himself and O. Chinnappa Reddy, J. delivered the majority opinion. R.S. Pathak, J. delivered a separate opinion.

The Court in *Som Parkash Rekhi v. Union of India and another* (supra), was posed with the question — whether Bharat Petroleum Corporation Ltd., a statutory corporation, was an 'authority', and therefore 'the State' under Article 12. Certain observations made by Krishna Iyer, J. are pertinent. To begin with, he said, "any authority under control of the Government of India comes within the definition." While dealing with the corporate personality, it has to be remembered that "while the formal ownership is cast in the corporate mould, the reality reaches down to State control". The core fact is that the Central Government chooses to make over, for better management, its own property to its own offspring. A Government Company is a mini-incarnation of Government itself, made up of its blood and bones and given corporate shape and status for defined objectives and not beyond. The device is too obvious for deception. A Government Company though, is but the alter ego of the Central Government and tearing of the juristic veil worn, would bring out the true character of the entity being 'the State'. Krishna Iyer, J. held it to be immaterial whether the Corporation is formed by a statute or under a statute, the true test is functional. "Not how the legal person is born but why it is created." He further held that both the things are essential: (i) discharging functions or doing business as the proxy of the State by wearing the corporate mask, and (ii) an element of ability to affect legal relations by virtue of power vested in it by law. These tests, if answered in positive, would entail the Corporation being an instrumentality or agency of the State. What is an 'authority'? Krishna Iyer, J. defined 'authority' as one which in law belongs to the province of power and the search here must be to see whether the Act vests authority, as agent or instrumentality of the State, to affect the legal relations of oneself or others. He quoted the definition of 'authority' from the Law Lexicon by P. Ramnath Iyer to say "Authority is a body having jurisdiction in certain matters of a public nature" and from Salmond's Jurisprudence, to say that the "ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons," must be present *ab extra* to make a person an 'authority'." He held BPL to be "a limb of Government and agency of the State, a vicarious creature of statute", because of these characteristics, which he found from the provisions of the Act which created it and other circumstances, viz., (i) it is not a mere company but much more than that, (ii) it has a statutory flavour in its operations and functions, in its powers and duties and in its personality itself,

(iii) it is functionally and administratively under the thumb of Government; and (iv) the Company had stepped into the shoes of the executive power of the State and had unique protection, immunity and powers. In conclusion Krishna Iyer, J. held that the case of BPL was a close parallel to the Airport Authority's case (Ramanna's case) excepting that Airport Authority is created by a statute while BPL is recognized by and clothed with rights and duties by the statute. Krishna Iyer, J. having culled out the several tests from Ramanna's case added a clinching footnote the finale is reached when the cumulative effect of all the relevant factors above set out is assessed and once the body is found to be an instrumentality or agency of Government, the further conclusion emerges that it is 'the State' and is subject to the same constitutional limitations as Government and it is this divagation which explains the ratio of Ramanna's case.

The three-Judges Bench in *The Workmen, Food Corporation of India Vs. Food Corporation of India*, (1985) 2 SCC 136, held Food Corporation of India to be an instrumentality of the State covered by the expression 'other authority' in Article 12. It was found : (i) FCI was set up under the Food

Corporation Act, 1964 (ii) initial capital was provided by Central Government and capital could be increased in such manner as the government may determine; (iii) the Board of Directors in whom the management of the Corporation is to vest shall act according to instructions on question of policy given by the Central Government; (iv) the annual net profit of FCI is to be paid to the Central Government; (v) annual report of its working and affairs is to be laid before the Houses of Parliament; (vi) statutory power conferred to make rules and regulations for giving effect to the provisions of the parent act as also to provide for service matters relating to officers and employees.

The Mysore Paper Mills Ltd. has been held by a two-Judges Bench in *Mysore Paper Mills Ltd. Vs. The Mysore Paper Mills Officers Association and Anr.* JT 2002 (1) SC 61, to be an instrumentality and agency of the State Government, the physical form of company being a mere cloak or cover for the Government. What is significant in this decision is that the conclusion whether an independent entity satisfies the test of instrumentality or agency of the government is not whether it owes its origin to any particular Statute or Order but really depends upon a combination of one or more of the relevant factors, depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be, by piercing the corporate veil of the entity concerned.

What is 'Authority' and when includible in 'other authorities', re: Article 12 We have, in the earlier part of this judgment, referred to the dictionary meaning of 'authority', often used as plural, as in Article 12 viz. 'other authorities'. Now is the time to find out the meaning to be assigned to the term as used in Article 12 of the Constitution.

A reference to Article 13(2) of the Constitution is apposite. It provides \_\_\_\_ "The State shall not make any law which takes away or abridges the right conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void". Clause (3) of Article 13 defines 'law' as including any Ordinance, order, bye-law, rule, regulation, notification, custom or uses having in the territory of India the force of law. We have also referred to the speech of Dr. B.R. Ambedkar in Constituent Assembly explaining the purpose sought to be achieved by Article

12. In RSEB's case, the majority adopted the test that a statutory authority "would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law". In Sukhdev Singh's case, the principal reason which prevailed with A.N. Ray, CJ for holding ONGC, LIC and IFC as authorities and hence 'the State' was that rules and regulations framed by them have the force of law. In Sukhdev Singh's case, Mathew J. held that the test laid down in RSEB's case was satisfied so far as ONGC is concerned but the same was not satisfied in the case of LIC and IFC and, therefore, he added to the list of tests laid down in RSEB's case, by observing that though there are no statutory provisions, so far as LIC and IFC are concerned, for issuing binding directions to third parties, the disobedience of which would entail penal consequences, yet these corporations (i) set up under statutes,

(ii) to carry on business of public importance or which is fundamental to the life of the people \_\_\_\_ can be considered as the State within the meaning of Article 12. Thus, it is the functional test which

was devised and utilized by Mathew J. and there he said, "the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13(2) of the Constitution. The State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State". It is pertinent to note that functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or agency in absence whereof that function would have been a State activity on account of its public importance and being fundamental to the life of the people.

The philosophy underlying the expansion of Article 12 of the Constitution so as to embrace within its ken such entities which would not otherwise be the State within the meaning of Article 12 of the Constitution has been pointed out by the eminent jurist H.M. Seervai in Constitutional Law of India (Silver Jubilee Edition, Vol.1).

"The Constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations. . . . . Under Article 13(2) it is State action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Article 13(2). For, although Articles 17, 23 and 24 show that fundamental rights can be violated by private individuals and relief against them would be available under Article 32, still, by and large, Article 13(2) is directed against State action. A public corporation being the creation of the State, is subject to the same constitutional limitations as the State itself. Two conditions are necessary, namely, that the Corporation must be created by the State and it must invade the constitutional rights of individuals"(Para 7.54). "The line of reasoning developed by Mathew J. prevents a large-scale evasion of fundamental rights by transferring work done in Govt. Departments to statutory Corporations, whilst retaining Govt. control. Company legislation in India permits tearing of the corporate veil in certain cases and to look behind the real legal personality. But Mathew J. achieved the same result by a different route, namely, by drawing out the implications of Article 13(2)" (Para 7.57 *ibid*).

The terms instrumentality or agency of the State are not to be found mentioned in Article 12 of the Constitution. Nevertheless they fall within the ken of Article 12 of the Constitution for the simple reason that if the State chooses to set up an instrumentality or agency and entrusts it with the same power, function or action which would otherwise have been exercised or undertaken by itself, there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. In different judicial pronouncements, some of which we have reviewed, any company, corporation, society or any other entity having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a double or a proxy or a limb or an off-spring or a

mini-incarnation or a vicarious creature or a surrogate and so on \_\_\_ by whatever name called \_\_\_ of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an instrumentality or agency of the State.

It is this basic and essential distinction between an 'instrumentality or agency' of the State and 'other authorities' which has to be borne in mind. An authority must be an authority sui juris to fall within the meaning of the expression 'other authorities' under Article 12. A juridical entity, though an authority, may also satisfy the test of being an instrumentality or agency of the State in which event such authority may be held to be an instrumentality or agency of the State but not the vice versa.

We sum up our conclusions as under:-

(1) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public.

Further, the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people \_\_\_ their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power \_\_\_ constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in *Ajay Hasia* enable determination of Governmental ownership or control. Tests 3, 5 and 6 are 'functional' tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between 'instrumentality and agency' of the State and an 'authority' having been lost sight of sub-silently, unconsciously and un-deliberated. In our opinion, and keeping in view the meaning which 'authority' carries, the question whether an entity is an 'authority' cannot be answered by applying *Ajay Hasia* tests.

(2) The tests laid down in *Ajay Hasia*'s case are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in positive nor a positive answer to one or two tests would suffice. It will depend upon a

combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State.

CSIR, if 'the State'?

Applying the tests formulated hereinabove, we are clearly of the opinion that CSIR is not an 'authority' so as to fall within the meaning of expression 'other authorities' under Article 12. It has no statutory flavour \_\_\_ neither it owes its birth to a statute nor is there any other statute conferring it with such powers as would enable it being branded an authority. The indicia of power is absent. It does not discharge such functions as are governmental or closely associated therewith or being fundamental to the life of the people.

We may now examine the characteristics of CSIR. On a careful examination of the material available consisting of the memorandum of association, rules and regulations and bye-laws of the society and its budget and statement of receipts and outgoings, we proceed to record our conclusions. The Government does not hold the entire share capital of CSIR. It is not owned by the Government. Presently, the Government funding is about 70% and grant by Government of India is one out of five categories of avenues to derive its funds. Receipts from other sources such as research, development, consultation activities, monies received for specific projects and job work, assets of the society, gifts and donations are permissible sources of funding of CSIR without any prior permission/consent/sanction from the Government of India. Financial assistance from the Government does not meet almost all expenditure of the CSIR and apparently it fluctuates too depending upon variation from its own sources of income. It does not enjoy any monopoly status, much less conferred or protected by Government. The governing body does not consist entirely of Government nominees. The membership of the society and the manning of its governing body - both consist substantially of private individuals of eminence and independence who cannot be regarded as hands and voice of the State. There is no provision in the rules or the byelaws that the government can issue such directives as it deems necessary to CSIR and the latter is bound to carry out the same. The functions of the CSIR cannot be regarded as governmental or of essential public importance or as closely related to governmental functions or being fundamental to the life of the people or duties and obligations to public at large. The functions entrusted to CSIR can as well be carried out by any private person or organization. Historically it was not a department of government which was transferred to CSIR. There was a Board of Scientific and Industrial Research and an Industrial Research Utilisation Committee. The CSIR was set up as a society registered under the Societies Registration Act, 1860 to coordinate and generally exercise administrative control over the two organizations which would tender their advice only to CSIR. The membership of the society and the governing body of the council may be terminated by the President not by the Government of India. The governing body is headed by the Director General of CSIR and not by the President of Society (i.e. the Prime Minister). Certainly the board and the committee, taken over by CSIR, did not discharge any regal, governmental or sovereign functions. The CSIR is not the offspring or the blood

and bones or the voice and hands of the government. The CSIR does not and cannot make law.

However, the Prime Minister of India is the President of the society. Some of the members of the society and of the governing body are persons appointed ex-officio by virtue of their holding some office under the Government also. There is some element of control exercised by the government in matters of expenditure such as on the quantum and extent of expenditure more for the reason that financial assistance is also granted by the Government of India and the later wishes to see that its money is properly used and not misused. The President is empowered to review, amend and vary any of the decisions of the governing body which is in the nature of residual power for taking corrective measures vesting in the President but then the power is in the President in that capacity and not as Prime Minister of India. On winding up or dissolution of CSIR any remaining property is not available to members but 'shall be dealt with in such manner as Government of India may determine'. There is nothing special about such a provision in Memorandum of Association of CSIR as such a provision is a general one applicable to all societies under Section 14 of the Societies Registration Act, 1860. True that there is some element of control of the government but not a deep and pervasive control. To some extent, it may be said that Government's presence or participation is felt in the society but such presence cannot be called a brooding presence or the overlordship of government. We are satisfied that the tests in *Ajay Hasia's* case are not substantially or on essential aspects even satisfied to call CSIR an instrumentality or agency of the State. A mere governmental patronage, encouragement, push or recognition would not make an entity 'the State'.

On comparison, we find that in substance CSIR stands on a footing almost similar to the Institute of Constitutional and Parliamentary Studies (in *Tekraj Vasandi @ K.L. Basandhi Vs. Union of India & Ors.*, (1988) 1 SCC 236) and National Council of Educational Research and Training (in *Chander Mohan Khanna Vs. NCERT*, (1991) 4 SCC 578), and those cases were correctly decided.

Strong reliance was placed by the learned counsel for the appellants on a notification dated 31.10.1986 issued in exercise of the powers conferred by sub-Section (2) of Section 14 of the Administrative Tribunals Act, 1985 whereby the provisions of sub-Section (3) of Section 14 of the said Act have been made applicable to the Council of Scientific and Industrial Research, "being the society owned or controlled by government". On point of fact we may state that this notification, though of the year 1986, was not relied on or referred to in the pleadings of the appellants. We do not find it mentioned anywhere in the proceedings before the High Court and not even in the SLP filed in this Court. Just during the course of hearing this notification was taken out from his brief by the learned counsel and shown to the Court and the opposite counsel. It was almost sprung as a surprise without affording the opposite party an opportunity of giving an explanation. The learned Attorney General pointed out that the notification was issued by Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) and he appealed to the Court not to overlook the practical side in the working of the government where at times one department does not know what the other department is doing. We do not propose to enter into a deeper scrutiny of the notification. For our purpose, it would suffice to say that Section 14 of the Administrative Tribunals Act, 1985, and Article 323A of the Constitution to which the Act owes its origin, do not apparently contemplate a society being brought within the ambit of the Act by a notification of Central Government. Though, we guardedly abstain from expressing any opinion on this issue as the



present one cannot be an occasion for entering into that exercise. Moreover, on the material available, we have recorded a positive finding that CSIR is not a society "owned or controlled by Government". We cannot ignore that finding solely by relying on the contents of the notification wherein we find the user of relevant expression having been mechanically copied but factually unsupportable.

For the foregoing reasons, we are of the opinion that Council for Scientific and Industrial Research (CSIR) is not the State within the meaning of Article 12 of the Constitution. Sabhajit Tewary's case was correctly decided and must hold the field. The High Court has rightly followed the decision of this Court in Sabhajit Tewary. The appeal is liable to be dismissed.

J. ( R.C. Lahoti ) .J. ( Doraiswamy Raju ) April 16,2002