

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 06TH DAY OF DECEMBER, 2022

BEFORE

THE HON'BLE MR. JUSTICE M. NAGAPPASANNA

WRIT PETITION No.9587 OF 2022 (GM - RES)

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BETWEEN:

M/S UNITED BROTHERS
HEALTHCARE SERVICES PVT. LTD.,
A COMPANY REGISTERED UNDER
THE COMPANIES ACT, 2013
M/S. UNITED HOSPITAL
#110, MADHAVAN PARK CIRCLE,
10TH MAIN ROAD, JAYANAGAR 3RD BLOCK,
BENGALURU - 560 001
REPRESENTED BY ITS EXECUTIVE DIRECTOR
DR.SHANTAKUMAR MURUDA
S/O MR.CHANDRASHETTY MURUDA
AGED ABOUT 46 YEARS.

... PETITIONER

(BY SRI B.K.SAMPATH KUMAR, SR.ADVOCATE A/W
SRI THAMMAIAH H.N., ADVOCATE)

AND:

1. MINISTRY OF HEALTH AND FAMILY WELFARE
GOVERNMENT OF INDIA,
ROOM NO.348, 'A' WING,
NIRMAN BHAVAN,
NEW DELHI - 110 011
REPRESENTED BY ITS
SECRETARY (H AND FW)

- 2 . INDIAN COUNCIL OF MEDICAL RESEARCH
V.RAMALINGASWAMI BHAWAN,
P.O.BOX NO.4911, ANSARI NAGAR,
NEW DELHI – 110 029
REPRESENTED BY ITS
SECRETARY DHR AND DIRECTOR GENERAL.
- 3 . COMPETITION COMMISSION OF INDIA
9TH FLOOR, OFFICE BLOCK-1,
KIDWAI NAGAR (EAST)
NEW DELHI – 110 023
REPRESENTED BY ITS SECRETARY.
- 4 . M/S. BHARAT BIOTECH
INTERNATIONAL LIMITED
A COMPANY REGISTERED
UNDER THE COMPANIES ACT, 1956
HAVING ITS REGISTERED
OFFICE AT GENOME VALLEY,
SHAMEERPET,
HYDERBAD – 500 078
TELANGANA STATE, INDIA
REPRESENTED BY ITS
CHIEF FINANCIAL OFFICER,
MR.T.SRINIVAS.

... RESPONDENTS

(BY SRI JAGANNATH V.C., ADVOCATE FOR R1;
SRI MADHUKAR DESHPANDE, ADVOCATE FOR R2;
SRI HARISH B.N., SR.ADVOCATE FOR
SMT.NAYANA TARA B.G., ADVOCATE FOR R3;
SRI AKASH V.T., ADVOCATE FOR R4)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND
227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASHING THE
SUPPLY AGREEMENT DATED 02.07.2021 AT ANNEXURE-A AND THE

REVISED LETTER OF CONSENT DATED 13.12.2021 AT ANNEXURE-G1 AND ETC.,

THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 22.11.2022, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:-

ORDER

The petitioner-M/s. United Brothers Healthcare Services Private Limited through its unit M/s United Hospital ('the Hospital' for short) is before this Court seeking to quash supply agreement dated 02-07-2021, revised letter of consent dated 13-12-2021 and also recovery of money from the hands of the 4th respondent - M/s. Bharat Biotech International Limited ('the Company' for short). Therefore, the issue in the *lis* is concerning a private contract between the two private entities.

2. Facts adumbrated are as follows:-

The petitioner/Hospital claims to be a state-of-the-art 50 bedded super speciality hospital in the south of Bangalore and also claims to have in-depth expertise in advanced medical and surgical interventions. It is further averred that the Hospital is engaged in procurement, storage and administering COVID-19 vaccines to people on non-commercial terms. It need not be elaborated in any

great detail as it is in public domain that the entire globe was engulfed with pandemic COVID-19.

3. The National Institute of Virology, the Institute which is under the control of the 2nd respondent/Indian Council of Medical Research succeeds in isolating the viral strain of COVID-19 for vaccine development in March 2020. Later, the know-how was transmitted to the 4th respondent/Company for production and distribution of vaccine in the name of "Covaxin". It is averred that Government of India through the Department of Biotechnology transferred Rs.200/- crores to the 4th respondent owing to shortfall of supplies across the nation. It is, therefore, contended that Covaxin was developed under public private partnership through a formal Memorandum of Understanding between the 2nd respondent and the 4th respondent. The issue is not with regard to the agreement or the Memorandum of Understanding between the 2nd respondent/ICMR and the 4th respondent/Company.

4. The 4th respondent enters into an agreement/supply agreement for supply of 25,000 doses (2,500 vials) of Covaxin with

the petitioner/Hospital and the entire invoice amount of Rs.2,62,50,000/- was agreed to be paid in advance which the petitioner/Hospital contends that it had raised a finance from HDFC Bank for the said purpose. Pursuant to the agreement entered into between the Hospital and the Company, the petitioner/Hospital also undertook certain advertisements for distribution of Covaxin, which the petitioner/Hospital claims to have costed Rs.30/- lakhs. From 17-09-2021 onwards, it is contended, that the petitioner/Hospital communicated several e-mails and made innumerable phone calls to the 4th respondent expressing its helplessness in pushing Covaxin to general public owing to negative publicity around it and inability of the 4th respondent to obtain necessary approvals from the World Health Organization which comes about only in the month of November 2021.

5. The petitioner/Hospital claims to have requested the 4th respondent to take back the remaining doses of Covaxin that was lying with the petitioner/Hospital and compensate the petitioner/Hospital for the same or replace the doses with fresh sets that will have a longer shelf life or to facilitate transfer of doses at the

invoiced amount to other hospitals where there was a demand for Covaxin. The 4th respondent replies to the said communications either electronically or otherwise on 29-09-2021 that 15,000 doses of Covaxin were due to expire by November 2021 and the petitioner himself could transfer Covaxins to other Hospitals. In this manner correspondences galore between the Hospital and the Company and finally, on 23-11-2021, the petitioner/Hospital claims that the 4th respondent back tracked the earlier offer and refused to process any refund relying on the terms of the supply agreement. Therefore, the entire stock of vaccines given to the petitioner/Hospital by the 4th respondent was set to expire and no steps were taken by the 4th respondent to either compensate the petitioner/Hospital or to take back the vaccine which led the petitioner/Hospital to cause a legal notice upon the 4th respondent seeking refund of Rs.1,69,15,500/-. The petitioner/Hospital also claims that it negotiated with the 4th respondent/Company through third parties but, they also fail. Thereafter, the 4th respondent/Company replies to the legal notice caused upon it denying all the claims. The denial of the claim in terms of a private

contract, between the two private entities, is what drives the petitioner/Hospital to this Court in the subject petition.

6. The matter was heard on the issue of maintainability as, if the petition is not maintainable or entertainable before this Court for issuance of any writ under Article 226 of the Constitution, no other ground need be considered. Therefore, order was reserved with the consent of parties, only on maintainability/entertainability of the petition.

7. Heard Sri B.K. Sampath Kumar, learned senior counsel appearing for the petitioner/Hospital; Sri V.C. Jagannath, learned counsel appearing for respondent No.1; Sri Madhukar Deshpande, learned counsel for respondent No.2; Sri B.N. Harish, learned senior counsel appearing for respondent No.3 and Sri V.T. Akash, learned counsel appearing for respondent No.4/Company.

8. The learned senior counsel appearing for the petitioner/Hospital would contend with vehemence that the flair of contract between the petitioner/Hospital and the 4th respondent/Company is in the realm of public function, as Covaxin was to be distributed to

all the public and the Government had capped the price of Covaxin to be at certain amount from time to time. Therefore, the learned senior counsel would contend that the element of public function and public interest are writ large in the case at hand. He would seek to place reliance upon the judgment of the Apex Court which *suo motu* took upon the overseeing of distribution of Essential Supplies and Services during Pandemic reported in **AIR 2021 SC 2904**, to buttress his submission, that distribution of Covaxin was a public function and the agreement between the petitioner/Hospital and the 4th respondent/Company, though a private contract, has a flair of public law and therefore, the petition is maintainable. He would seek to place reliance upon the judgments of the Apex Court in the cases of:

- (i) **ABL INTERNATIONAL LIMITED AND ANOTHER v. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LIMITED AND OTHERS** – (2004) 3 SCC 553;
- (ii) **K.K. SAKSENA v. INTERNATIONAL COMMISSION ON IRRIGATION AND DRAINAGE AND OTHERS** – (2015) 4 SCC 670;

- (iii) **SANJANA M.WIG (Ms) v. HINDUSTAN PETROLEUM CORPORATION LIMITED** – (2005) 8 SCC 242 and
- (iv) **PIONEER URBAN LAND AND INFRASTRUCTURE LIMITED v. GOVINDAN RAGHAVAN** – (2019) 5 SCC 725.

9. The learned counsel for the 4th respondent/Company would seek to refute the submissions of the learned senior counsel to contend that a petition under Article 226 of the Constitution of India would not be maintainable before this Court, as it is a private contract between the parties which also envisages arbitration to be the mode of resolution of the dispute. All the contentions of the learned senior counsel have been adequately replied at the outset when the legal notice was caused upon the Company. He would contend that the petitioner/Hospital instead of filing a civil suit seeking recovery of amount has knocked the doors of this Court seeking issuance of a writ which is, on the face of it, not maintainable. He would place reliance upon the judgment of the Apex Court in the case of **RAMAKRISHNA MISSION AND ANOTHER v. KAGO KUNYA AND OTHERS** – (2019) 16 SCC 303 to contend that merely because Government has funded production

of vaccine to the 4th respondent it does not make it an authority under Article 12 of the Constitution of India for the petition to be maintainable under Article 226 of the Constitution. He would further place reliance on the judgment in the case of **FEDERAL BANK LIMITED v. SAGAR THOMAS AND OTHERS - (2003)10 SCC 733** for the same proposition.

10. The learned senior counsel representing the 3rd respondent/Competition Commission of India would submit that the 3rd respondent is unnecessarily dragged into these proceedings as there is not even a communication sent to the Competition Commission of India to initiate anything against the 4th respondent. Assumptions and presumptions galore in the pleadings. Therefore, there is nothing that the 3rd respondent has to answer in the petition. If the petition were to be held to be maintainable, the learned senior counsel would seek leave to file objections in detail to the petition.

11. The 2nd respondent/ICMR also would follow suit to contend that there is no relief claimed against it and it is also, without any rhyme or reason, dragged into these proceedings.

12. Refuting these submissions, the learned senior counsel appearing for the petitioner/Hospital would contend that merely because arbitration clause is available in the agreement that is entered into between the parties, it would not mean that the writ petition would not be maintainable. He would place reliance upon the judgment of the Apex Court in the case of **UTTAR PRADESH POWER TRANSMISSION CORPORATION LIMITED AND ANOTHER v. CG POWER AND INDUSTRIAL SOLUTIONS LIMITED AND ANOTHER – AIR 2021 SC 2411**. He would further contend that the power of this Court under Article 226 of the Constitution of India is so wide that it can issue any writ, to any private party. He would seek reliance upon the judgment of the Apex Court in the case of **BENEDICT DENIS KINNY v. TULIP BRIAN MIRANDA AND OTHERS – AIR 2020 SC 3050**.

13. I have given my anxious consideration to the submissions made by the respective learned counsel and perused the material on record. In furtherance whereof, the only issue that falls for consideration in the facts of the case is:

Whether the subject writ petition under Article 226 of the Constitution of India would be maintainable or entertainable before this Court?

14. The afore-narrated facts, link in the chain of events, correspondences between the Hospital and the Company are not in dispute. The genesis of the issue is when the Hospital enters into an agreement with the Company. Therefore, it becomes germane to notice certain clauses of the agreement that is entered into between the parties on 02-07-2021 and they read as follows:-

"THIS SUPPLY AGREEMENT ("Agreement") is entered on 02.07.2021 ("Effective Date") at Hyderabad by and between:

BHARAT BIOTECH INTERNATIONAL LIMITED, a company incorporated under the Companies Act, 1956 and having its registered office at Genome Valley, Shameerpet, Hyderabad – 500 078, Telangana State, India (hereinafter called as "**Manufacturer**" which expression shall, unless it be repugnant to the context or meaning thereof include its successors, administrators, representatives, and assigns) of the ONE PART;

AND

UNITED BROTHERS HEALTH CARE SERVICES PRIVATE LIMITED, a company incorporated under the Companies Act, 2013 having its registered office at 4TH FLOOR, NO. 27, SHIVADARSHNI APTS, BESIDES SAFEENA PLAZA INFANTRY ROAD, BANGALORE, Bengaluru (Bangalore) Urban, Karnataka 560 001 (hereinafter referred to as the "**Purchaser**" which expression shall, unless it be repugnant to the context or meaning thereof means and includes its, successors, administrators, representatives, and assigns) of the SECOND PART.

Both Manufacturer and PURCHASER are hereinafter referred to individually as "Party" and collectively as "Parties".

WHEREAS, Manufacturer is a multi-dimensional Bio-technology company specialized in product-oriented research and development, clinical trials and leading manufacturer of vaccines and biotherapeutics. The Manufacturer has developed COVAXIN, India's 1st indigenous Covit-19 vaccine ("Product"), in collaboration with the Indian Council of Medical Research-National Institute of Virology (NIV) and the Product has received the required regulatory approval for administration to the general public above the age of 18 years as part of the COVID-19 immunization program.

AND WHEREAS, PURCHASER is engaged in procurement, storage, administering the COVID-19 vaccine to people and has necessary infrastructure and skilled manpower to carry out such activities at its premises or any other location in the Territory. PURCHASER has the necessary authorization given by the Regulatory Authority to administer the Product to the public and such authorization is currently in force and not withdrawn or suspended by the Regulatory Authority.

... ..
5. OBLIGATIONS OF PARTIES

5.1 Obligations of Manufacturer:

- a. Manufacturer shall be solely responsible for the manufacture of the Product. Manufacturer ascertains that it has obtained the necessary Regulatory Approvals for the manufacture and sale of the Product and it will continue to maintain all such Regulatory Approvals throughout the Term of this Agreement.

5.2 Obligations of Purchaser:

- a. PURCHASER will be responsible for suitable storage, handling and proper administration of the Product in the Territory in accordance with the label claim of the Product.
- b. PURCHASER shall not charge more than the INR 1260 (All inclusive) for the Product, who are registered in the CO-WIN portal while administering at hospital premises.
- c. PURCHASER shall validate the number of doses of the Product received from the Manufacturer with the number

of people to whom the Product has been administered by PURCHASER on bi-weekly basis clearly marking if it is first dose or second dose is administered.

PURCHASER shall submit consolidated report with basic details of persons to whom the Product has been administered to the Manufacturer bi-weekly or at such periodicity as may be mutually agreed by the Parties as per the regulatory requirement. Further supplies of the Product by the Manufacturer shall be subject to the details provided by PURCHASER. Non-compliance of this clause will be treated as breach of the Agreement by PURCHASER and PURCHASER may be black-listed to receive any further supplies from the Manufacturer. Manufacturer reserves the right to share the information shared under this clause with all appropriate authorities more particularly to the drug department for non-compliance.

- d. Doses must be administered to the person registered CO-WIN website or app and all the doses administered must be updated on CO-WIN website or app on real time basis.*
- e. Purchaser shall not resale the Product for further trading activity to third parties.*
- f. In addition to the terms and conditions of this Agreement, PURCHASER shall also comply with all necessary guidelines and instructions as may be issued by the Regulatory Authority from time to time in respect of the Covid-19 immunization programme.*

6. REPRESENTATIONS, WARRANTIES AND COVENANTS

- 6.1 Manufacturer hereby represents, warrants and covenants the following:*
 - a. Manufacturer is a corporation duly organized, existing and in good standing under the laws of the Territory, with full right, power and authority to enter into and perform this Agreement.*
 - b. The execution, delivery and performance of this Agreement do not conflict with, violate, or breach any agreement to which Manufacturer is a party or Manufacturer's Articles of Association.*
 - c. This Agreement has been duly executed and delivered by Manufacturer and is a legal, valid and binding obligation*

enforceable against Manufacturer in accordance with its terms.

- d. *Product supplied by the Manufacturer complies with all Applicable Laws, consent decrees, and regulations of any central, state or other governmental authority. Product is supplied without any guarantee, based on no batch failures and CDSCO approvals as the Product is first allocated to Government of India.*

6.2 *PURCHASER hereby represents, warrants and covenants the following:*

- a. *PURCHASER is duly organized, existing and in good standing under the laws of the Territory, with full right, power and authority to enter into and perform this Agreement.*
- b. *The execution, delivery and performance of this Agreement do not conflict with, violate, or breach any agreement to which PURCHASER is a party.*
- c. *This Agreement has been duly executed and delivered by PURCHASER and is a legal, valid and binding obligation enforceable against PURCHASER in accordance with its terms.*
- d. *PURCHASER shall comply with all Applicable Laws, consent decrees, and regulations of any central, state, or other governmental authority.*
- e. *PURCHASER has the necessary approvals, permits and licenses under Applicable Laws for purchase of the Product from the Manufacturer and for storage and administration of the Product.*
- f. *PURCHASER shall not re-engineer or use the Product in conjunction with any other product or attempt to represent the Product as its own or mix the same with any other vaccines.*

13. **DISPUTE RESOLUTION**

The Parties shall make every effort to resolve amicably by direct, informal negotiations any disagreement or dispute arising between them under or in connection with this Agreement. The Parties agree that any or all disputes arising out of this Agreement be referred to a sole arbitrator appointed by mutual consent and such arbitration shall be in accordance with provisions of the

Arbitration and Conciliation Act, 1996, its amendments and enactments thereof. The language of arbitration shall be English and place of Arbitration shall be Hyderabad."

(Emphasis added)

The contract afore-quoted, so entered into between the Hospital and the Company is purely, 'a private contract'. The conditions or covenants or the obligations of the manufacturer and the purchaser are the obligations mutually agreed to between the two. There is no element of any wing of the State that has stepped into the contract in any manner. The contract also recognizes the resolution of the dispute by way of arbitration, and the place of arbitration to be Hyderabad. The agreement is signed by the representatives i.e., the Chairman and Managing Director and Executive Director of the petitioner/Hospital and Officers of the Company. Therefore, with eyes wide open the petitioner/Hospital enters into the agreement with the 4th respondent and the agreement is purely a commercial transaction between two private entities.

15. After entering into the agreement certain invoices are drawn by the Company on the petitioner/Hospital for supply and the said invoices depict that the petitioner/Hospital had to pay

Rs.2,62,97,522 for the supply of vaccine. Vaccine was supplied immediately. The learned counsel for the petitioner/Hospital intends to contend by taking this Court through the e-mails, that vaccine was not universally accepted, as the WHO had not yet approved the vaccine and, therefore, there was no buyer for the vaccine and sought that vaccine be taken back and amount be refunded. Plethora of mails are exchanged between the parties i.e., the petitioner and the 4th respondent/Company. All were indicative of the fact that there were assurances by the 4th respondent/Company for taking back the vaccines or refund of the amount. Therefore, it was a transaction that was between the petitioner and the Company for procurement of vaccines, return of vaccines, refund of amount for return of those vaccines. The State or any other Authority that can be a State under Article 12 of the Constitution of India is not privy to the said private contract. The contract may have been for supply of vaccines and vaccines to be administered to the general public. This cannot make a private contract metamorphose into a statutory contract.

16. Dressing this private interest with public interest, the learned senior counsel seeks to contend that it was a public duty of the 4th respondent - Company to have supplied vaccine for administration to the general public and the vaccine itself was developed on a public-private partnership and therefore, the public law remedy would become available, notwithstanding a private contract, for supply of vaccine. These contentions are *sans* substance. Merely because covaxin is taken by millions and millions of people of the nation would not make a private contract to become enforceable or justiciable in the Courts of law, which are predominantly meant for public law remedy. The submissions made in support of maintainability or entertainability of the petition are all rendered acceptable, as they are fundamentally flawed.

17. It is now germane to consider the authorities that the petitioner/Hospital has sought to place reliance upon, as all of them are his sheet anchor, *qua* maintainability of the petition before this Court. The Apex Court in the case of **ABL INTERNATIONAL LIMITED AND ANOTHER v. EXPORT CREDIT GUARANTEE**

CORPORATION OF INDIA LIMITED AND OTHERS¹ (*supra*) has

held as follows:

"27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

- (a) In an appropriate case, **a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.**
- (b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.
- (c) A writ petition involving a consequential relief of monetary claim is also maintainable.

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corpn. v. Registrar of Trade Marks* [(1998) 8 SCC 1].) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(Emphasis supplied)

¹ (2004) 3 SCC 553

The Apex Court holds that in an appropriate case a writ petition against a State or an instrumentality of a State arising out of a contractual obligation is maintainable. Merely because some disputed questions of fact arise for consideration, writ cannot be refused. Even a monetary claim is maintainable before this Court. The Apex Court deduces the said principle after considering the facts and entire spectrum of law. The Apex Court has clearly held that in an appropriate case writ petition against a State or instrumentality of State arising out of contractual obligation is maintainable and not a contract between the two private entities. The claim in **ABL INTERNATIONAL**'s case was against Export Credit Guarantee Corporation of India Limited, an instrumentality of the State. Therefore, the said judgment is inapplicable to the facts of the case at hand. The judgment in the case of **SANJANA M. WIG (Ms) v. HINDUSTAN PETROLEUM CORPORATION LIMITED**² (*supra*) was again against Hindustan Petroleum Corporation Limited which is declared to be a State under Article 12 of the Constitution of India. Contractual obligation arising out of a contract entered into between the State or its instrumentalities was again held to be

² (2005) 8 SCC 242

maintainable under the writ jurisdiction. The Apex Court follows

ABL INTERNATIONAL and holds as follows:

"14. A Division Bench of this Court in ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553 : JT (2003) 10 SC 300] observed that in certain cases even a disputed question of fact can be gone into by the court entertaining a petition under Article 226 of the Constitution, holding: (SCC p. 572, para 28)

"28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1 .) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

... ..

18. It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in Amritsar Gas Service [(1991) 1 SCC 533] and E. Venkatakrishna [(2000) 7 SCC 764] that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while

entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent.

19. But in a case of this nature, while exercising a plenary jurisdiction, we must take the supervening circumstances into consideration. The parties admittedly invoked the arbitration agreement before the arbitrator. They entered into a settlement. Pursuant to or in furtherance of the said settlement, the appellant herein was to pay a sum of Rs 4,64,586 unto the respondent in five installments with interest. The appellant herein for violation of the terms of contract presumably prayed for award of damages but no reference thereto has been made in the award. In any event such claim of damages could have been made before the arbitrator on the ground of alleged breach of contract."

Much reliance is placed upon the judgment of the Apex Court in the case of ***K.K. SAKSENA v. INTERNATIONAL COMMISSION ON IRRIGATION AND DRAINAGE AND OTHERS***³ (*supra*) wherein the Apex Court was considering, a claim against International Commission on Irrigation and Drainage. The Apex Court in the said judgment holds as follows:

"32. If the authority/body can be treated as "State" within the meaning of Article 12 of the Constitution of India, indubitably a writ petition under Article 226 would be maintainable against such an authority/body for enforcement of fundamental and other rights. Article 12 appears in Part III of the Constitution,

³ (2015) 4 SCC 670

which pertains to "fundamental rights". Therefore, the definition contained in Article 12 is for the purpose of application of the provisions contained in Part III. Article 226 of the Constitution, which deals with powers of the High Courts to issue certain writs, inter alia, stipulates that every High Court has the power to issue directions, orders or writs to any person or authority, including, in appropriate cases, any Government, for the enforcement of any of the rights conferred by Part III and for any other purpose.

33. In this context, when we scan through the provisions of Article 12 of the Constitution, as per the definition contained therein, the "State" includes the Government and Parliament of India and the Government and legislature of each State as well as "all local or other authorities within the territory of India or under the control of the Government of India". It is in this context the question as to which body would qualify as "other authority" has come up for consideration before this Court ever since, and the test/principles which are to be applied for ascertaining as to whether a particular body can be treated as "other authority" or not have already been noted above. If such an authority violates the fundamental right or other legal rights of any person or citizen (as the case may be), a writ petition can be filed under Article 226 of the Constitution invoking the extraordinary jurisdiction of the High Court and seeking appropriate direction, order or writ. However, under Article 226 of the Constitution, the power of the High Court is not limited to the Government or authority which qualifies to be "State" under Article 12. Power is extended to issue directions, orders or writs "to any person or authority". Again, this power of issuing directions, orders or writs is not limited to enforcement of fundamental rights conferred by Part III, but also "for any other purpose". Thus, power of the High Court takes within its sweep more "authorities" than stipulated in Article 12 and the subject-matter which can be dealt with under this article is also wider in scope.

34. In this context, the first question which arises is as to what meaning is to be assigned to the expression "any person or authority". By a catena of judgments rendered by this Court, it now stands well

grounded that the term "authority" used in Article 226 has to receive wider meaning than the same very term used in Article 12 of the Constitution. This was so held in Andi Mukta Sadguru [Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] . In that case, dispute arose between the Trust which was managing and running science college and teachers of the said college. It pertained to payment of certain employment related benefits like basic pay, etc. The matter was referred to the Chancellor of Gujarat University for his decision. The Chancellor passed an award, which was accepted by the University as well as the State Government and a direction was issued to all affiliated colleges to pay their teachers in terms of the said award. However, the aforesaid Trust running the science college did not implement the award. Teachers filed the writ petition seeking mandamus and direction to the Trust to pay them their dues of salary, allowances, provident fund and gratuity in accordance therewith. It is in this context an issue arose as to whether the writ petition under Article 226 of the Constitution was maintainable against the said Trust which was admittedly not a statutory body or authority under Article 12 of the Constitution as it was a private Trust running an educational institution. The High Court held that the writ petition was maintainable and the said view was upheld by this Court in the aforesaid judgment."

(Emphasis supplied)

The Apex Court in the case of **K.K.SAKSENA** was dealing with a question, whether the International Commission on Irrigation and Drainage was a State under Article 12 of the Constitution of India and a writ could be issued against the said Commission. It was held by the Apex Court that the Commission was performing its duties which were collection of data, research, holding of seminars,

organising studies, promotion of development and systematic management of sustained irrigation and drainage systems, observing all that, the Apex Court has held as follows:

"49. There is yet another very significant aspect which needs to be highlighted at this juncture. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review, as already pointed out above. Only those decisions which have public element therein can be judicially reviewed under writ jurisdiction. In Praga Tools Corpn. v. C.A. Imanual [(1969) 1 SCC 585] , as already discussed above, this Court held that the action challenged did not have public element and writ of mandamus could not be issued as the action was essentially of a private character. That was a case where the employee concerned was seeking reinstatement to an office.

50. We have also pointed out above that in Saka Venkata Rao [Election Commission of India v. Saka Venkata Rao, AIR 1953 SC 210] this Court had observed that administrative law in India has been shaped on the lines of English law. There are a catena of judgments in English courts taking same view, namely, contractual and commercial obligations are enforceable only by ordinary action and not by judicial review. In R. (Hopley) v. Liverpool Health Authority [2002 EWHC 1723 (Admin) : 2002 Lloyd's Med Rep 494] (unreported)(30-7-2002), Justice Pitchford helpfully set out three things that had to be identified when considering whether a public body with statutory powers was exercising a public function amenable to judicial review or a private function. They are : (i) whether the defendant was a public body exercising statutory powers; (ii) whether the function being performed in the exercise of those powers was a public or a private one; and (iii) whether the defendant was performing a public duty owed to the claimant in the particular circumstances under consideration."

The Apex Court at the afore-quoted paragraphs would hold that even if a body is a State, it is not amenable to writ jurisdiction and all its decisions are not subject to judicial review. The case does not remotely assist the petitioner/Hospital to drive home the contention that the fourth respondent was performing public duty. Therefore, the said judgment also would not become applicable to the facts of the case at hand, as it was concerning appointment and termination of the petitioner therein, ***K.K. SAKSENA***.

18. The other judgment on which the learned senior counsel for the petitioner/Hospital has placed reliance upon to contend that merely because an arbitration clause is available, it would not mean that writ petition under Article 226 of the Constitution would not be maintainable, in the said judgment it was an agreement between Uttar Pradesh Power Transmission Corporation Limited which is a State under Article 12 of the Constitution of India. Therefore, reliance placed on the said judgment is misplaced and as such it is inapplicable to the facts of the case on hand.

19. Much reliance is placed again on the judgment in the case of **BENEDICT DENIS KINNY** to contend that Covaxin is developed under public-private partnership through formal memorandum of understanding between ICMR and the Company and ICMR receives 5% royalty of net sales. The judgment is inapplicable and the contention is noted only to be rejected. The Government may enter into any agreement with any private entity for discharge of public functions. The agreement, in the case at hand, is not entered into between the Government and any wing of the Government or any other instrumentality of the State which can be considered to be other Authority under Article 12 of the Constitution of India, but it is entered into between the petitioner/Hospital and the 4th respondent/Company. To iterate it is a 'private contract'. Therefore, none of the armory from the arsenal of the learned senior counsel for the petitioner – Hospital would lend any assistance to hold the writ petition to be entertainable *qua* the relief that is sought. A recovery suit that had to be filed or an arbitration proceeding that had to be initiated, is sought to be dressed with the colour of public function, to make it entertainable, which is plainly unacceptable.

20. Now, reference being made to the judgment of the Apex Court in the case of **RAMAKRISHNA MISSION AND ANOTHER v. KAGO KUNYA AND OTHERS**⁴ (*supra*) seems apposite. The Apex Court holds as follows:

"15. Ramakrishna Mission runs a 263 bedded hospital at Itanagar. The grant in aid which is provided by the State Government covers the cost of running 60 beds out of 263 bedded hospital. Relevant factual data in regard to the nature and extent of the grants has been placed on record. About 32.26 per cent of the total income of the hospital for 2014-2015, 23.33 per cent for 2015-2016 and 22.53 per cent for 2016-2017 was from the grants provided by the State Government. The revenue expenditure, the audited balance sheets and accounts of the hospital indicate that 35.23 per cent of the expenditure for 2014-2015, 23.83 per cent for 2015-2016 and 20.57 per cent for 2016-2017 was borne from the finances provided by the State Government.

... ..

30. Thus, even if the body discharges a public function in a wider sense, there is no public law element involved in the enforcement of a private contract of service.

... ..

32. Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The

⁴ (2019) 16 SCC 303

hospital has no monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an "authority" within the meaning of Article 226. State Governments provide concessional terms to a variety of organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present case, the absence of State control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority.

...

....

....

34. Thus, contracts of a purely private nature would not be subject to writ jurisdiction merely by reason of the fact that they are structured by statutory provisions. The only exception to this principle arises in a situation where the contract of service is governed or regulated by a statutory provision. Hence, for instance, in K.K. Saxena [K.K. Saxena v. International Commission on Irrigation & Drainage, (2015) 4 SCC 670 : (2015) 2 SCC (Civ) 654 : (2015) 2 SCC (L&S) 119] this Court held that when an employee is a workman governed by the Industrial Disputes Act, 1947, it constitutes an exception to the general principle that a contract of personal service is not capable of being specifically enforced or performed.

35. It is of relevance to note that the Act was enacted to provide for the regulation and registration of clinical establishments with a view to prescribe minimum standards of facilities and services. The Act, inter alia, stipulates conditions to be satisfied by clinical establishments for registration. However, the Act does not govern contracts of service entered into by the hospital with respect to its employees. These fall within the ambit of purely private contracts, against which writ jurisdiction cannot lie. The sanctity of this distinction must be preserved.

36. For the above reasons, we are of the view that the Division Bench of the High Court was not justified in coming to the conclusion that the appellants are amenable to the writ jurisdiction under Article 226 of the Constitution as an authority within the meaning of the Article.

37. For the reasons that we have adduced above, we hold that neither the Ramakrishna Mission, nor the hospital would constitute an authority within the meaning of Article 226 of the Constitution.

38. Before concluding, it would be necessary to also advert to the fact that while the learned Single Judge had come to the conclusion that the appellants are "State" within the meaning of Article 12, the Division Bench has not accepted that finding. The Division Bench ruled, as we have noticed earlier, that the appellants do not fall within the description of "State" under Article 12. This finding has not been challenged before this Court by the State of Arunachal Pradesh.

39. Even otherwise, we are clearly of the view that the tests which have been propounded in the line of authority of this Court in *Ajay Hasia v. Khalid Mujib Sehravardi* [*Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] , *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* [*Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111 : 2002 SCC (L&S) 633] and *Jatya Pal Singh v. Union of India* [*Jatya Pal Singh v. Union of India*, (2013) 6 SCC 452 : (2013) 2 SCC (L&S) 617] support the conclusion of the High Court that the appellants are not "State" within the meaning of Article 12 of the Constitution of India."

(Emphasis supplied)

The Apex Court clearly holds that even if the body discharges a public function in a wider sense, there is no public law element involved in a private contract of service. This judgment considers the sheet anchor of the learned senior counsel for the petitioner

i.e., **K.K. SAKSENA** and then holds writ cannot be maintainable for enforcement of a private contract. The case at hand clearly demonstrates that it is filed for the enforcement of a private contract. Long before the judgment in the case of **RAMAKRISHNA MISSION**, the Apex Court in the case of **FEDERAL BANK LIMITED v. SAGAR THOMAS AND OTHERS**⁵ (*supra*) has also held that Federal Bank would not be 'other authority' under Article 12 of the Constitution of India. Following the Constitution Bench judgment in the case of **PRADEEP KUMAR BISWAS v. INDIAN INSTITUTE OF CHEMICAL BIOLOGY - (2002) 5 SCC 111** the Apex Court holds as follows:

"27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions

⁵ (2003)10 SCC 733

contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. The six factors which have been enumerated in the case of *Ajay Hasia* [*Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] and approved in the later decisions in the case of *Ramana* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] and the seven-Judge Bench in the case of *Pradeep Kumar Biswas* [(2002) 5 SCC 111 : 2002 SCC (L&S) 633] may be applied to the facts of the present case and see whether those tests apply to the appellant Bank or not. As indicated earlier, share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection. So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purpose of maintaining a healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by Reserve Bank of India under a statute or the Central Government. Even if it was with the Central Government

in place of Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of All India Bank Employees' Assn. [AIR 1962 SC 171 : (1962) 3 SCR 269] does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

29. *There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, maybe banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] . Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument, even if it may be assumed that one or the other test as provided in the case of Ajay Hasia [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas [(2002) 5 SCC 111: 2002 SCC (L&S) 633] quoted earlier would also be relevant.*

30. *We may now consider the two decisions i.e. Andi Mukta [(1989) 2 SCC 691] and U.P. State Coop. Land Development Bank Ltd. [(1999) 1 SCC 741 : 1999 SCC (L&S) 389 : AIR 1999 SC 753] upon which much reliance has been*

placed on behalf of the respondents to show that a writ would lie against the appellant company. So far as the decision in the case of *U.P. State Coop. Land Development Bank Ltd.* [(1999) 1 SCC 741 : 1999 SCC (L&S) 389 : AIR 1999 SC 753] is concerned, it stands entirely on a different footing and we have elaborately discussed it earlier.

31. The other case which has been heavily relied upon is *Andi Mukta* [(1989) 2 SCC 691]. It is no doubt held that a mandamus can be issued to any person or authority performing public duty, owing positive obligation to the affected party. The writ petition was held to be maintainable since the teacher whose services were terminated by the institution was affiliated to the university and was governed by the ordinances, casting certain obligations which it owed to that petitioner. But it is not the case here. Our attention has been drawn by the learned counsel for the appellant to paras 12, 13 and 21 of the decision (*Andi Mukta* [(1989) 2 SCC 691]) to indicate that even according to this case no writ would lie against the private body except where it has some obligation to discharge which is statutory or of public character.

32. Merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(c)(a) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. As to the provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now a judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for the acquiring authority.

33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

(Emphasis supplied)

The Apex Court after noticing the judgment of the Constitution Bench in **PRADEEP KUMAR BISWAS** holds that merely because the Reserve Bank of India has laid down Banking policy in the interest of banking system, it would not make the banking business of a private company carrying on its business as a commercial activity a public duty. These private banking companies cannot be held to be discharging a public function or a public duty. The Apex

Court thus reverses the judgment passed by the High Court of Kerala, which had held the petition to be maintainable and holds that writ petition under Article 226 of the Constitution of India would not be maintainable.

21. Herculean effort is made by the learned senior counsel to contend that the petition would come within 'other authorities' under Article 12 of the Constitution of India. Neither the petitioner/Hospital nor the Company would in any way come within the definition of 'other authorities' for they do not discharge any public function, their generation of business is purely on private interest and on commercial lines. Remedy under Article 226 of the Constitution of India is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. The scope of issuance of a writ in the nature of *mandamus* is limited to enforce public duty. I fail to understand what is the public duty that is sought to be projected in the case at hand. The petitioner/Hospital or the 4th respondent-Company neither discharge public duty nor they can be construed to be "Other Authority" to seek a public law remedy at the hands of this Court. Therefore, the

powers of the Court which deal with public law remedy is not ajar, but closed, to the issue in the case at hand. Wherefore, the petition is neither maintainable nor entertainable, as this Court would not issue a writ that would interfere with a private contract between two private entities. It is for the petitioner/Hospital to avail all such remedy, as is available in law seeking recovery of money. ***Writ petition for recovery of money, by a private entity, from a private entity, arising out of a private contract, cannot be entertained.***

22. For the aforesaid reasons, I pass the following:

ORDER

- (i) Writ Petition stands dismissed.
- (ii) Dismissal of the writ petition or the observations made herein would not come in the way of the parties agitating their respective rights before any competent *fora*.

**Sd/-
JUDGE**

bkp
CT: MJ