* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Pronounced on: 23rd January, 2024**

\+ W.P.(C) 9083/2023 & CM APPL. 34571/2023

DR. SNEHASHISH BHATTACHARYA & ORS. ..... Petitioners

Through: Mr. Abhik Chimni, Mr. Saharsh Saxena, Mr. Anant Khajuria and Ms. Riya Pahuja, Advocates

versus

SOUTH ASIAN UNIVERSITY ..... Respondent

Through: Mr. Sandeep Kumar Mahapatra, Ms. Mrinmayee Sahu and Ms. Kritika Sharma, Advocates

CORAM:
HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

J U D G M E N T

CHANDRA DHARI SINGH, J.

FACTUAL MATRIX

1. The petitioners in the present matter are Associate Professors in the various Departments of the respondent University. The respondent University is an Intergovernmental University established by the agreement entered between the members of the South Asian Association for Regional Cooperation ('SAARC' hereinafter) in the year 2007 and in pursuance of the same, the Parliament of India had enacted the South Asian University Act, 2008 ('SAU Act' hereinafter).

2. The management of the respondent University is entrusted to a governing body consisting of two members each from the respective

Member States of the SAARC members having financial, functional and administrative control over the respondent University.

3. In 2022, a group of students started a protest for redressal of their grievances which allegedly vitiated the academic and administrative atmosphere of the respondent University whereby the said students also allegedly manhandled the Acting President and took him hostage for some time and eventually, he was rescued with the intervention of the Police. The alleged protest continued for 20 days and the students involved in the said incident were suspended from the respondent University thereafter.

4. Thereafter, due to alleged involvement in the protest, the petitioners were issued show cause notices dated 30th December, 2022 seeking response to the charges leveled against them. The relevant extract of one such show cause notice is as under:

> *"A. On 14 October 2022 at22:51, by jointly and/or severally authoring a SAU email and circulating it by your official SAU email address collectively to SAU President, Vice President, Registrar, faculty, student and staff, and*
> *B. On 05 November 2022 at2l:15, by jointly and/or severally authoring SAU emails and circulating them by your official SAU email address not only collectively to SAU faculty, staff and students, including MessrsSudeepto Das and Kumar Rohit of the Faculty of Economics, but also individually to SAU President, Vice President, Registrar, faculty members and students,*
> *C. On 05 November 2022 at 23:03, by jointly and/or severally authoring SAU emails and circulating them by your official SAU email address not only collectively to SAU faculty, staff and students, including MessrsSudeepto Das and Kumar Rohit of the Faculty of Economics, but also individually to SAU*

President, Vice President, Registrar, faculty members and students,

You:
*l. Made wild and unsubstantiated allegations against the University administration which constitutes misconduct on your part as a University teacher defined by Rule 23 and in terms of Bye Law XII made under Regulation 17.8**.*
*2. Incited students, particularly the said Messrs Das, Rohit and Ms Sandra Elizabeth Joseph against colleagues, the administration and against the interest of the University which constitutes misconduct on your part as a University teacher defined by Rule 23 and in terms of Bye Law XII made under Regulation 17.8**. The said Ms Joseph circulated an email on l5 October 2022 at22:20 to SAU faculty members and in the name of "Aijaz Ahmad Study Circle-A Marxist Study Circle Run by the Students of the South Asian University" which "condemns the entry of the Delhi Police into the campus" while conspicuously concealing or ignoring a prior disturbance of the peace of the University or impairment of its dignity in violation of Article VIII of the Headquarters Agreement between the Host Country India and the University, particularly by manhandling and gheraoed of the Acting President on l3 October 2022 and in violation also of the Indian Penal Code, 1860. Neither any "Marxist Study Circle" has been registered with SAU nor has SAU allowed any persons to indulge in any illegal activities on the SAU Campus.*
2.1 Do you have any connection (as a member or advisor or any other rore) with this unrecognized "Circle"?
2.2 If so, have you disclosed this to SAU regarding your affiliation?
2.3Have you obtained any funds from this "Circle" for spending amongst the SAU community?
2.4 If so, did you take permission from, or inform, the SAU administration?
2.5 Do you have any other such information that you want to disclose?

*3. Incited students, particularly the said Messes Das and Rohit, against colleagues, the administration and against the interest of the University, which constitutes misconduct on your part as a University teacher defined by Rule 23 and in terms of Regulation 17.8** and Bye Law XII, particularly because, on 23 November 2022, the said Mr Rohit forcibly and without permission of the Acting Registrar entered his office when he was meeting officials of the University, attempted to force the Acting Registrar and the said other officials to do what they were not bound to do (such as to completely revoke disciplinary action duly taken against certain students and to offer their resignation) or omit from doing (such as discussion before considering necessary action as per the Rules, Regulations and Bye Laws) under the said SAU Rules, Regulations and Bye Laws, made office of the Acting Registrar totally dysfunctional/paralyzed by forcibly and without his permission entering it and by attempting, as aforesaid, and made the Acting Registrar captive for several hours to again force him to do what he was not bound to do, as aforesaid, or omit from doing, as aforesaid, thereby did not allow him to leave his office for home until the availability of assistance from the Host country and in violation also of the said Penal Code.*

*4. Failed to refrain from inciting students, particularly the said Messes Das, Rohit and Ms Joseph, against colleagues, the administration and against the interest of the Univesity, which constitutes misconduct on your part as a University teacher defined by Rule 23 and in terms of Bye Law XII made under Regulation 17.8**,*

5. Failed to perform your duty to respect the laws and regulations of the Host country, as aforesaid, and in violation of Article XI of the said Headquarters Agreement by concealing or ignoring in your aforesaid email of 14 October 2022 a prior disturbance of the peace of the University or impairment of its dignity in violation of Article VIlI of the Headquarters Agreement between the Host Country India and the University, particularly by manhandling and gheraoed of the Acting President on 13 October 2022. particluarly in violation also of the said Penal Code.

*6. Failed to participate in such activities of the University and perform such duties in the University as may be required by and in accordance with the Rules, Regulations and Bye Laws fromed thereunder including Rule $ 2.1 and Regulation 5. 1.7 which define the responsibilities and powers of the President for maintaining good order and smooth functioning of the University) which constitutes misconduct on your part in terms of Bye Law XII made under Regulation 17.8**.*

You are therefore requested to duly respond to this communication within a week so that the matter may be further considered as per the Rules, Regulations and Bye Laws.
This issues with approval of the competent authority."

5. Pursuant to the issuance of the show cause notices, the respondent University formed a Fact-Finding Committee ('FCC' hereinafter) where the petitioners' role in the protest was determined and they were provided opportunity to participate in the proceedings on the said Committee, however, allegedly, the petitioners did not cooperate with the said Committee when the opportunity was provided to appear before it.

6. On 29th May, 2023, the FFC submitted its report where it was concluded that the petitioners had *prima facie* acted in a manner which can be construed as a violation of the extant Rules, Regulations and Byelaws, including but not limited to the Code of Conduct of the respondent University.

7. After receiving the report from the FFC, the Acting President of the respondent University suspended the petitioner's *vide* orders dated 16th June, 2023.

8. Aggrieved by the same, the petitioners have approached this Court under Article 226 of the Constitution of India seeking the following reliefs:

> *"It is therefore most respectfully prayed that this Hon'ble court may be pleased to:*
> *a) Issue a Writ/Direction/Order quashing the office orders dated 16.06.2023; and*
> *b) Issue a Writ/Direction/Order quashing the notification dated 29.03.2023; and*
> *c) Issue a Writ/Direction/Order quashing the show cause notices dated 30.12.2022; and*
> *d) Grant the litigation costs in favour of the Petitioner; and/or*
> *e) Pass any such further orders in the favour of the Petitioner as this Hon'ble Court may deem fit in the facts and circumstances of the case.*
> *And for this act of kindness, the Petitioner, as in duty bound, shall ever pray."*

9. During the proceedings of the present writ and other connected matters, the learned counsel appearing on behalf of the respondent University has raised the issue of maintainability of the said writ and referred to numerous clauses and the charter of the respondent University to supplement her arguments.

10. Therefore, the limited question, at this instance, is whether the present petitions are maintainable, and considering the statements on behalf of the learned counsel for the petitioner, whether this Court has the jurisdiction to entertain the reliefs as sought by the petitioners.

SUBMISSIONS

(*on behalf of the respondents*)

11. The learned counsel for the respondents, at the outset, objected to the instant petition on the ground of maintainability and submitted that

this Court lacks the jurisdiction to entertain and adjudicate upon the present writ petition as the respondent University is an intergovernmental University established by the 2007 Agreement of the Governments of the SAARC Countries and the said agreement is the highest law of the University, followed by the intergovernmental Rules, Regulations and bye-laws and the preamble of the said Rules provides for precedence of the legal instruments of the respondent University over national legislations of the various countries associated with it.

12. It is submitted that while signing the intergovernmental agreement in 2007, the members of the respondent University, i.e. the SAARC countries had agreed that the University shall be a non-State, non-profit, self-governing international educational institution with main campus at New Delhi and in pursuance of the same, the Parliament of India had enacted the South Asian University Act, 2008 ('SAU Act' hereinafter).

13. It is submitted that the respondent University does not meet the criteria laid down for state instrumentality governed under the Article 12 of the Constitution of India as it is not financially, functionally or under the pervasive control of the Government of India. Furthermore, even though it is true that 50% of the funding to the respondent University comes from the Government of India, the absence of pervasive control over administration and functioning of the respondent University makes it clear that the respondent University is does not fall within the ambit of the said Article of the Constitution of India hence, it is amenable to writ jurisdiction.

14. It is submitted that Section 6 of the SAU Act empowers the Governing body to be responsible for the management of the University

and the member nations of the SAARC have equal representation in the said body.

15. It is submitted that the respondent University does not receive any grant from the University Grants Commission ('UGC' hereinafter) and does not conform to the rules and regulations laid down by the UGC and therefore, cannot be held as a central university like any other universities controlled by the UGC in the Country.

16. It is submitted that Section 14 of the SAU Act provides for immunity to the officials of the respondent University and the same were notified by the Ministry of External Affairs, Union of India by way of a Gazette notification dated 15th January, 2009, whereby, the immunity provided under Section 3 of the United Nations (Privileges and Immunities) Act, 1947 ('UN Act' hereinafter) was accorded to the project office and officials of the respondent University under certain terms. The said terms are as follows:

> *"2 And whereas, in pursuance of the decision of the Inter-governmental Steering Committee of the SAARC, it is expedient to accord the Project Office and officials thereof, and the South Asian University, its President, Registrar and Faculty members the privileges and immunities in India similar to those contained in Articles I, III, IV, V, VI and VII of the Schedule to the United Nations Privileges and Immunities) Act, 1947. Now therefore, the Central Government in exercise of the powers conferred by Section 3 of the said Act, hereby declare that the provisions of Articles II, III, IV, V, VI and VII of the Schedule to the said Act shall apply mutatis mutandis to the Project Office and officials thereof, and the South Asian University, its President, Registrar and Faculty Members for giving effect to the said Headquarters' Agreement".*"

17. It is submitted that the respondent University is well within their powers to instill discipline in employees and the said powers stems from Section 8 of the SAU Act, whereby the University has been conferred the said powers to exercise as and when required.

18. It is also submitted that the University has placed a system for redressal of the grievances of the employees where referral to an Arbitral Tribunal can be made for resolving a dispute, however, the petitioners in the instant case chose to directly approach this Court by way of filing the instant petitions thereby surpassing the procedure established for redressal of grievance where the petitioners have an option to approach the Arbitral Tribunal.

19. In view of the foregoing submissions, the learned counsel for the respondent University submitted that the respondent University, being an international organization is not subject to the writ jurisdiction conferred to this Court under Article 226 of the Constitution of India, therefore, the instant petitions are not maintainable.

(on behalf of the petitioner)

20. *Per Contra,* the learned counsel appearing on behalf of the petitioners vehemently opposed the said contentions advanced by the learned counsel for the respondents and submitted that the SAU Act provides for the respondent University to be tried in the Court of law of the Country and the said intent of the legislation is evident from Section 29 of the SAU Act**.**

21. It is submitted that Section 29 of the SAU clearly makes the respondent University liable to be tried in the Court of law if the

University does not act in good faith and does not conform to the provisions of the SAU Act.

22. It is submitted that the suspension orders passed by the respondent University fail to show any material change in the circumstances which could have compelled the respondent University to suspend the petitioners when the show cause notices were already issued with regard to the alleged indiscipline.

23. It is submitted that Section 3 of the UN Act confers immunity and privileges to the international organizations which is limited only to individual/official but not to the institution, therefore, the immunity conferred to the officials of the respondent University is only with regard to personal liability and not to the respondent University in entirety.

24. It is submitted that the procedure prescribed for dispute resolution under the UN Act has not been made applicable to the respondent University, and the University was established by an Act of the Parliament, pursuant to the intergovernmental agreement between the SAARC nations so as to provide for all legal recourse including the right to approach the Constitutional Courts of the country in which the University is established.

25. It is submitted that if this Court holds the University is not amenable to writ jurisdiction of the Constitutional Courts, the respondent University would virtually become an institution against which there is no remedy in law while the respondent University, being situated in territory of India and the benefitting from the public funds of the country.

26. It is submitted that the funds for infrastructure and lands for the campus of the respondent University has been completely funded by the

Government of India and the University operates within the constitutional setup and framework of India where the writ Courts are meant to protect the constitutional rights of the people if there is any violation by any instrumentality of the State, therefore, the respondent University being an instrumentality of the State, is liable to fall within the ambit of Article 12 of the Constitution of India.

27. It is submitted that since Section 2(f) of the UGC Act, 1985 defines 'University' and meaning thereby, a University incorporated under a Central Act, a Provincial Act or a State Act and Entry 15 of the list of 56 Central Universities, as notified by the UGC, mentions the name of the South Asian University, the respondent University is well within the bounds of the Article 12 of the Constitution of India.

28. It is also submitted that even if it is assumed that the respondent University is not within the definition of an authority under Article 12, it is engaged in imparting higher education and thus discharging public function, therefore, satisfying the test laid down in ***Dr. Janet Jeyapaul v. SRM University*, (2015) 16 SCC 530,** and is thus amenable to Article 226 of the Constitution of India.

29. The learned counsel for the petitioner further contended that the respondent University has not been provided any immunity from the legal proceedings, rather has been given protection from specific laws such as taxation, customs etc. and therefore, the said protection cannot be termed as an institutional immunity provided to the respondent University under the UN Act.

30. It is submitted that the Articles III and VI of the UN Act give an exhaustive list of the immunities and privileges available to the SAU and

a reading of the same would show that the respondent University does not have a blanket protection, rather is only exempted from paying taxes, customs duties etc.

31. It is further contended that even though Article VI of the UN Act provides for immunities from personal arrest and prosecution, the same is limited to the President and faculty members and are not applicable to the respondent University.

32. It is submitted that the Gazette notification dated 15th January, 2009 chose not to make applicable Article VIII of the UN Act which provides jurisdiction to the International Court of Justice ('ICJ' hereinafter) and therefore, the legislative intent was to keep intact the writ jurisdiction of the Courts against the respondent University.

33. In view of the foregoing submissions, the learned counsel appearing on behalf of the petitioners submitted that this Court is well within its powers to issue any writ as conferred under Article 226 of the Constitution of India and therefore, prays that the present writ may be heard on merits and decided accordingly.

(On behalf of respondents-rejoinder)

34. During the course of proceedings, the learned counsel appearing on behalf of the respondent University as rejoinder vehemently opposed the said submissions made by the counsel for the petitioner and rebutted the arguments as mentioned in the succeeding paragraphs.

35. The learned counsel submitted that the argument regarding immunities provided only to the President and faculty members of the respondent University is not legally sound as the Notification dated 15th

January, 2009 clearly accorded immunity to the respondent University 'from every form of legal process'.

36. It is submitted that the immunity granted to the respondent University as an intergovernmental organization is no different than the immunities provided to the intergovernmental organizations in other countries, and the purpose for the same is rooted in the need to protect international organizations from unilateral control by a member nation over activities of the international organizations within its territory.

37. It is submitted that Section 26 of the SAU Act and Rule 25.2 as drafted by the Standing Committee of the respondent University provides for an Arbitral Tribunal to have sole jurisdiction over the disputes arising out of the contracts of employment between the respondent University and the petitioners.

38. It is submitted that the petitioners herein have not availed the said remedy available to them and therefore, without exhausting the alternative remedy the writ petition cannot be made maintainable.

39. It is submitted that the petitioner's contention regarding the responsibility of the respondent University to act in good faith cannot be admitted as Section 8 (xix) and (xviii) of the SAU Act provides for assumption of jurisdiction to consider the matter on merits, and the said jurisdiction is conferred with the Arbitral Tribunal and not the Constitutional Courts.

40. It is also submitted that the petitioners were suspended from the services after the FFC had confirmed their role in the said misconduct and therefore, *prima facie,* a strong case of misconduct is established against the petitioners.

41. It is therefore submitted that the present batch of petitions is liable to be dismissed both on maintainability as well as on merits.

ANALYSIS AND FINDINGS

42. Heard the learned counsel for the parties at length and perused the records relied upon by the counsel for substantiating their respective claims.

43. During the course of proceedings, the learned counsel for the respondent University made a preliminary objection to the maintainability of the present writs, and in furtherance of the same, both the counsel of the parties had restricted their submissions to the said aspect. Therefore, in this judgment, this Court is adjudicating the issue of maintainability only.

44. The crux of the contentions made by the learned counsel for the petitioner is that the present writ is maintainable because the immunity provided by the Ministry of External Affairs *vide* notification dated 15th January, 2009 only extends to the President and staff (faculty members) of the University, and the same does not confer any immunity on the University in itself. The counsel has further argued that the respondent University was established by an Act of the Parliament and the infrastructure has been developed with the help of land and funds provided by the Government of India for discharging public functions, therefore, making the respondent University well within the ambit of Article 12 of the Constitution of India. At last, the learned counsel contended that even if the University is held to be not a state under

Article 12 of the Constitution, it can still be subjected to the jurisdiction of this Court by virtue of it discharging public functions i.e., imparting higher education.

45. In rival submissions, the learned counsel for the respondent University denies the said submissions made by the petitioner and countered the same by stating that the respondent University was established by the Charter of the SAU signed and adopted by the SAARC countries having equal role in the administration and functioning of the respondent University. The learned counsel for the respondent further argued that the Preamble of respondent university itself clarifies the position of law regarding the maintainability of the present writ where the bye-laws governing the respondent University shall be given precedence over any other law of any member country including the Republic of India.

46. In furtherance of the said contentions, reliance has been placed upon various provisions of the SAU Act, UN Act, and other authorities dealing with the issue of international organizations situated in various jurisdictions across the world.

47. In light of the same, this Court deems it appropriate to frame the following issues to determine the question of maintainability of the present writ:

a) Whether the respondent University is an International Organization where the Republic of India, like any other member country is merely a member and does not exert any

special role in controlling the functioning of the University despite the existence of the University in Delhi?

b) Whether the immunity granted under the UN Act under Article 3 of the Act and extended to the officials of the University vide notification dated 15th January, 2009 extends to the University as well and therefore, exempts it from any form of litigation or whether the respondent University can be held under the ambit of Article 226 of the Constitution of India? If no, can it be said that the referral to Arbitral Tribunal for solving of disputes between the University and the petitioners is the only remedy available to the petitioner for redressal of their grievance against the impugned suspension orders.

Issue I

48. Before delving into this issue, it is apposite for this Court to briefly discuss the history of the respondent University and the intent for establishment of such an institution.

49. The respondent University is an institution established with an aim to foster regional cooperation and academic excellence among South Asian nations and the idea for establishment of the respondent University as conceived in the year 2005 during the 13th SAARC summit held in Dhaka, Bangladesh.

50. In the 2007 a Summit was held in New Delhi, the SAU Headquarter agreement was signed between the member countries leading to establishment of the respondent University. The relevant parts of the Headquarter agreement dated 4thApril, 2007 are as under:

*"**Article 1***

Establishment of the South Asian University

1. There is hereby established an institution to be known as the South Asian University (hereinafter referred to as the "University"), which shall be a non-state, non-profit self governing international educational institution with a regional focus for the purposes set forth in this agreement and shall have full academic freedom for the attainment of its objectives.
2. The main campus of the University shall be located in India.

3. The University shall have full legal Personality.
4. The legal capacity of the University shall, inter alia, include:
(a) The power to confer degrees, diplomas and certificates
(b) The capacity to contract;
(c) To sue and be sued in its name;
(d) To acquire, hold and dispose of properties;
(e) To establish campuses and centres in the region; and
(f) To make rules, regulations and bye laws for the operation of the University.

Article 2

Objectives & Functions of the South Asian University

The objectives and functions of the University shall, inter alia, include:
1. To create a world class institution of learning that will bring together the brightest and the most dedicated students from all countries of South Asia-irrespective of gender, caste, creed, disability, ethnicity or socio-economic background - to impart to them liberal and humane education and to give them the analytical tools needed for the pursuit of profession and inculcate in them the qualities of leadership.
2. To build a South Asian community of learning where every student will be able to develop her/his fullest intellectual potential and to create a South Asian community by strengthening regional consciousness;

3. To impart education towards capacity building of the South Asian nations in the domain of science, technology and other areas of higher learning vital for improving their quality of life;
4.To contribute to the promotion of regional peace and security by bringing together the future leaders of South Asia, and enhancing their understanding of each others' perspectives.
5. To foster in the students sound civic sense and to train them to become useful citizens of democratic societies;"

51. Upon perusal of the Article 1 of the said agreement, it is made out that the member countries intended to give the respondent University an identity of its own where the respondent University can sue or be sued under its own name having an identity independent of the SAARC member countries.

52. In light of the same, it is fair to deduce that the University has its own legal entity like any organization where legal liability can be drawn upon the University as and when required, however, the question is whether the Constitutional Courts situated in the Country can subject the respondent University to litigation under the writ jurisdiction conferred to them by the Constitution.

53. Pursuant to the said agreement signed between the member countries of the SAARC, the Government of India drafted an Act namely South Asian Act, 2008 ('SAU Act') whereby the Headquarters' Agreement was given effect to establish the respondent University.

54. For adjudication of the issue I, it is pertinent for this Court to look into the various provisions of the Act which has been discussed herein below.

55. It is well settled that for an entity to come within the ambit of writ jurisdiction, it is important to satisfy the test laid down for its inclusion as a 'State' under Article 12 of the Constitution of India. The said provision reads as under:

> *"12. Definition.—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."*

56. On a perusal of the above provision, it is apparent that the term 'State' and 'Law' are considered of utmost importance where the term 'State' includes the following:

> *(i) the Government and Parliament of India:*
> *(ii) the Government and the Legislature of a State;*
> *(iii) all local authorities; and*
> *(iv) other authorities within the territory of India, or under the control of the Central Government.*

57. In the said provision, apart from the term *other authority*, the other terms are self-explanatory where the term local authority has also been defined under General Clauses Act, 1897.

58. The question with regard to interpretation of the term "*other authority"* came up before the Hon'ble Supreme Court and it has time and again, whereby the landmark judgments delivered by the Hon'ble Court more or less settled the position regarding inclusion of the authorities under the term *other authority.*

59. In several cases, the question of statutory body being an authority under Article 12 came up before the Hon'ble Supreme Court where the

Hon'ble Court held that if a corporation is an instrumentality or agency of the government, it would be subject to the same constitutional or public law limitation as on the government itself.

60. The interpretation of the term *other authority* has been done by Justice Mathew in the case of ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, (1975) 1 SCC 421,** whereby and his concurring opinion in the case has been interpreted/relied upon in *stricto senso* by various Courts of the Country. The relevant portion of the said judgment is reproduced herein:

> *"**76.** In Rajasthan Electricity Board v. Mohan Lal [AIR 1967 SC 1857 : (1967) 3 SCR 377 : (1968) 1 Lab LJ 257] this Court had occasion to consider the question whether the Rajasthan Electricity Board was an authority within the meaning of the expression "other authorities" in Article 12 of the Constitution. Bhargava, J. delivering the judgment for the majority pointed out that the expression "other authorities" in Article 12 would include all constitutional and statutory authorities on whom powers are conferred by law. The learned Judge also said that if any body of persons has authority to issue directions, the disobedience of which would be punishable as a criminal offence, that would be an indication that that authority is "State". Justice Shah who delivered a separate judgment agreeing with the conclusion reached by the majority preferred to adopt a slightly different meaning to the words "other authorities". He said that authorities, constitutional or statutory, would fall within the expression "state" as defined in Article 12 only if they are invested with sovereign power of the State, namely, the power to make rules or regulations which have the force of law.*
>
> ***77.** The test propounded by the majority is satisfied so far as the Oil and Natural Gas Commission (hereinafter referred to as "the Commission") is concerned as Section 25 of the Oil and Natural Gas Commission Act (hereinafter referred to as "the Act") provides for issuing 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. In other words, as Section 25 authorises the Commission to issue binding directions to third parties not to prevent the employees of the Commission from entering into their land and as disobedience of such directions is punishable under the relevant provision of the Penal Code, 1860 since those employees are deemed to be public servants under Section 21 of the Penal Code, 1860 by virtue of Section 27 of the Act, the Commission is an "authority" within the meaning of the expression "other authorities" in Article 12.

78. *Though this would be sufficient to make the Commission a "State" according to the decision of this Court in the Rajasthan Electricity Board case [AIR 1967 SC 1857 : (1967) 3 SCR 377 : (1968) 1 Lab LJ 257] , there is a larger question which has a direct bearing so far as the other two corporations are concerned viz. whether, despite the fact that there are no provisions for issuing binding directions to third parties the disobedience of which would entail penal consequence, the corporations set up under statutes to carry on business of public importance or which is fundamental to the life of the people can be considered as "State" within the meaning of Article 12. That article reads:*

"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."

It is relevant to note that the Article does not define the word "State". It only provides that "State" includes the authorities specified therein. The question whether a corporation set up under a statute to carry on a business of public importance is a "State" despite the fact that it has no power to issue binding directions has to be decided on other considerations.

79. *One of the greatest sources of our strength in Constitutional Law is that we adjudge only concrete cases and do not pronounce principles in the abstract. But there comes a moment when the process of empiric adjudication calls for*

more rational and realistic disposition than that the immediate case is not different from preceding cases.

80. *The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as a coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation:*

"If we clearly grasp the character of the State as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability torender service." (See Mac Iver, The Modern State, p. 183).

81. *To some people State is essentially a class-structure, "an organization of one class dominating over the other classes"; others regard it as an organisation that transcends all classes and stands for the whole community. They regard it as a power-system. Some view it entirely as a legal structure, either in the old Austinian sense which made it a relationship of governors and governed, or, in the language of modern jurisprudence, as a community "organised for action under legal rules". Some regard it as no more than a mutual insurance society, others as the very texture of all our life. Some class the State as a great "corporation" and others consider it as indistinguishable from society itself [See Mac Iver, The Modern State, pp. 3-4]."*

61. Upon perusal of the above cited paragraphs, it is clear that Mathew J propelled the discussion regarding interpretation of *other authority* by presenting two conceptions of the State, one being a 'coercive machinery wielding the thunderbolt of authority', and the other, a 'service corporation' and held an authority to be within the bounds of Article 12 if it satisfies the said ingredients.

62. Therefore, it is imperative for the Courts to look into the structural features of an authority to determine as to whether the said authority can come within the ambit of Article 12 of the Constitution of India or not.

63. The issue regarding interpretation of the term *other authority* again came up before the Hon'ble Supreme Court in ***Ajay Hasia v. Khalid Mujib Sehravardi,*** **(1981) 1 SCC 722,** where the Hon'ble Court dealt with the aspect related to the inclusion of a corporation as an authority under Article 12 and held as under:

> *"**7.** While considering this question it is necessary to bear in mind that an authority falling within the expression "other authorities" is, by reason of its inclusion within the definition of "State" in Article 12, subject to the same constitutional limitations as the Government and is equally bound by the basic obligation to obey the constitutional mandate of the fundamental rights enshrined in Part III of the Constitution. We must therefore give such an interpretation to the expression "other authorities" as will not stultify the operation and reach of the fundamental rights by enabling the Government to its obligation in relation to the fundamental rights by setting up an authority to act as its instrumentality or agency for carrying out its functions. Where constitutional fundamentals vital to the maintenance of human rights are at stake, functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form. Now it is obvious that the Government may 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. In the early days when the Government had limited functions, it could operate effectively through natural persons constituting its civil service and they were found adequate to discharge Governmental functions which were of traditional vintage. But as the tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the framework of civil service was not*

sufficient to handle the new tasks which were often specialised and highly technical in character and which called for flexibility of approach and quick decision making. The inadequacy of the civil service to deal with these new problems came to be realised and it became necessary to forge a new instrumentality or administrative device for handling these new problems It was in these circumstances and with a view to supplying this administrative need that the corporation came into being as the third arm of the Government and over the years it has been increasingly utilised by the Government for setting up and running public enterprises and carrying out other public functions. Today with increasing assumption by the Government of commercial ventures and economic projects, the corporation has become an effective legal contrivance in the hands of the Government for carrying out its activities, for it is found that this legal facility of corporate instrument provides considerable flexibility and elasticity and facilitates proper and efficient management with professional skills and on business principles and it is blissfully free from "departmental rigidity, slow motion procedure and hierarchy of officers". The Government in many of its commercial ventures and public enterprises is resorting to more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases "the true owner is the State, the real operator is the State and the effective controllorate is the State and accountability for its actions to the community and to Parliament is of the State." It is undoubtedly true that the corporation is a distinct juristic entity with a corporate structure of its own and it carries on its functions on business principles with a certain amount of autonomy which is necessary as well as useful from the point of view of effective business management, but behind the formal ownership which is 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 worn for the purpose of convenience of management and administration cannot be allowed to obliterate the true nature of the reality behind which is the Government. Now it is obvious that if a corporation is an instrumentality or agency of the Government, it must be subject to the same limitations in the field of constitutional law as the Government itself, though in the eye of the law it would be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a fortiorari that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. If such a corporation were to be free from the basic obligation to obey the fundamental rights, it would lead to considerable erosion of the efficiency of the fundamental rights, for in that event the Government would be enabled to override the fundamental rights by adopting the stratagem of carrying out its functions through the instrumentality or agency of a corporation, while retaining control over it. The fundamental rights would then be reduced to little more than an idle dream or a promise of unreality. It must be remembered that the Fundamental rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation. The courts should be anxious to enlarge the scope and width of the fundamental rights by bringing within their sweep every authority which is an instrumentality or agency of the Government or through the corporate personality of which the Government is acting, so as to subject the Government in all its myriad activities, whether through natural persons or through corporate entities, to the basic obligation of the fundamental rights. The constitutional philosophy of a democratic socialist republic requires the Government to undertake a multitude of socio-economic operations and the Government, having regard to the practical advantages of functioning through the legal device of a corporation, embarks on myriad commercial and economic

activities by resorting to the instrumentality or agency of a corporation, but this contrivance of carrying on such activities through a corporation cannot exonerate the Government from implicit obedience to the Fundamental rights. To use the corporate methodology is not to liberate the Government from its basic obligation to respect the Fundamental rights and not to override them. The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the Government to assign to a plurality of corporations almost every State business such as post and telegraph, TV and radio, rail road and telephones — in short every economic activity — and thereby cheat the people of India out of the fundamental rights guaranteed to them. That would be a mockery of the Constitution and nothing short of treachery and breach of faith with the people of India, because, though apparently the corporation will be carrying out these functions, it will in truth and reality be the Government which will be controlling the corporation and carrying out these functions through the instrumentality or agency of the corporation. We cannot by a process of judicial construction allow the Fundamental rights to be rendered futile and meaningless and thereby wipe out Chapter III from the Constitution. That would be contrary to the constitutional faith of the post-Maneka Gandhi [Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621] era. It is the fundamental rights which along with the directive principles constitute the life force of the Constitution and they must be quickened into effective action by meaningful and purposive interpretation. If a corporation is found to be a mere agency or surrogate of the Government, "in fact owned by the Government, in truth controlled by the Government and in effect an incarnation of the Government", the court, must not allow the enforcement of fundamental rights to be frustrated by taking the view that it is not the Government and therefore not subject to the constitutional limitations. We are clearly of the view that where a corporation is an instrumentality or agency

of the Government, it must be held to be an "authority" within the meaning of Article 12 and hence subject to the same basic obligation to obey the Fundamental rights as the Government.

8. *We may point out that this very question as to when a corporation can be regarded as an "authority" within the meaning of Article 12 arose for consideration before this Court in R.D. Shetty v. International Airport Authority of India [(1979) 3 SCC 489] . There, in a unanimous judgment of three Judges delivered by one of us (Bhagwati, J.) this Court pointed out: (SCC pp. 506-07, para 13)*

"So far as India is concerned, the genesis of the emergence of corporations as instrumentalities or agencies of Government is to be found in the Government of India Resolution on Industrial Policy dated April 6, 1948 where it was stated inter alia that "management of State enterprise will as a rule be through the medium of public corporation under the statutory control of the Central Government who will assume such powers as may be necessary to ensure this." It was in pursuance of the policy envisaged in this and subsequent resolutions on Industrial policy that corporations were created by Government for setting up and management of public enterprises and carrying out other public functions. Ordinarily these functions could have been carried out by Government departmentally through its service personnel but the instrumentality or agency of the corporations was resorted to in these cases having regard to the nature of the task to be performed. The corporations acting as instrumentality or agency of Government would obviously be subject to the same limitations in the field of constitutional and administrative law as Government itself, though in the eye of the law, they would be distinct and independent legal entities. If Government acting through its officers is subject to certain constitutional and public law limitations, it must follow a fortiori that Government acting through the instrumentality or agency of corporations should equally be subject to the same limitations."

The court then addressed itself to the question as to how to determine whether a corporation is acting as an instrumentality

or agency of the Government and dealing with that question, observed: (SCC p. 507, para 14)

"A corporation may be created in one of two ways. It may be either established by statute or incorporated under a law such as the Companies Act, 1956 or the Societies Registration Act, 1860. Where a corporation is wholly controlled by Government not only in its policy-making but also in carrying out the functions entrusted to it by the law establishing it or by the charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of Government. But ordinarily where a corporation is established by statute, it is autonomous in its working, subject only to a provision, often times made, that it shall be bound by any directions that may be issued from time to time by Government in respect of policy matters. So also a corporation incorporated under law is managed by a board of Directors or committees of management in accordance with the provisions of the statute under which it is incorporated. When does such a corporation become an instrumentality or agency of Government? Is the holding of the entire share capital of the Corporation by Government enough or is it necessary that in addition there should be a certain amount of direct control exercised by Government and, if so, what should be the nature of such control? Should the functions which the corporation is charged to carry out possess any particular characteristic or feature, or is the nature of the functions immaterial? Now, 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. But, as is quite often the case, a corporation established by statute may have no shares or shareholders, in which case it would be a relevant factor to consider whether the administration is in the hands of a board of Directors appointed by Government though this consideration also may not be determinative, because even where the Directors are appointed by Government, they may be completely free from Governmental control in the discharge of their functions. What then are the tests to determine whether a corporation established by statute or incorporated under law is

an instrumentality or agency of Government? It is not possible to formulate an all-inclusive or exhaustive test which would adequately answer this question. There is no cut and dried formula, which would provide the correct division of corporations into those which are instrumentalities or agencies of Government and those which are not."

The court then proceeded to indicate the different tests, apart from ownership of the entire share capital: (SCC pp. 508 & 509, paras 15 & 16)

"... if extensive and unusual financial assistance is given and the purpose of the Government in giving such assistance coincides with the purpose for which the corporation is expected to use the assistance and such purpose is of public character, it may be a relevant circumstance supporting an inference that the corporation is an instrumentality or agency of Government.... It may, therefore, be possible to say that 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 .... But a finding of State financial support plus an unusual degree of control over the management and policies might lead one to characterise an operation as State action". Vide Sukhdev v. Bhagatram [(1975) 1 SCC 421, 454 : 1975 SCC (L&S) 101, 134 : (1975) 3 SCR 619, 658] . So also the existence of deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality. It may also be a relevant factor to consider whether the corporation enjoys monopoly status which is State conferred or State protected. There can be little doubt that State conferred or State protected monopoly status would be highly relevant in assessing the aggregate weight of the corporation's ties to the State...."

There is also another factor which may be regarded as having a bearing on this issue and it is whether the operation of the corporation is an important public function. It has been held in the United States in a number of cases that the concept of private action must yield to a conception of State action where public functions are being performed. Vide Arthur S. Miller:

The Constitutional Law of the 'Security State' [10 Stanford Law Review 620, 664] .... It may be noted that besides the so-called traditional functions, the modern State operates a multitude of public enterprises and discharges a host of other public functions. If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. This is precisely what was pointed out by Mathew, J., in Sukhdev v. Bhagatram [(1975) 1 SCC 421, 454 : 1975 SCC (L&S) 101, 134 : (1975) 3 SCR 619, 658] where the learned Judge said that 'institutions engaged in matters of high public interest of performing public functions are by virtue of the nature of the functions performed Government agencies. Activities which are too fundamental to the society are by definition too important not to be considered Government functions'."

The court however proceeded to point out with reference to the last functional test: (SCC p. 510, para 18)

"... the decisions show that even this test of public or Governmental character of the function is not easy of application and does not invariably lead to the correct inference because the range of Governmental activity is broad and varied and merely because an activity may be such as may legitimately be carried on by Government, it does not mean that a corporation, which is otherwise a private entity, would be an instrumentality or agency of Government by reason of carrying on such activity. In fact, it is difficult to distinguish between Governmental functions and non-Governmental functions. Perhaps the distinction between Governmental and non-Governmental functions is not valid any more in a social welfare State where the laissez faire is an outmoded concept and Herbert Spencer's social statics has no place. The contrast is rather between Governmental activities which are private and private activities which are Governmental. (Mathew, J., Sukhdev v. Bhagatram [Supra foot-note 4, SCC p 452 : SCC (L&S) p. 132 : SCR p. 652]). But the public nature of the function, if impregnated with Governmental character or tied

or entwined with Government" or fortified by some other additional factor, may render the corporation an instrumentality or agency of Government. Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference."

These observations of the court in the International Airport Authority case [(1979) 3 SCC 489] have our full approval.

9. *The tests for determining as to when a corporation can be said to be an instrumentality or agency of Government may now be culled out from the judgment in the International Airport Authority case [(1979) 3 SCC 489] . These tests are not conclusive or clinching, but they are merely indicative indicia which have to be used with care and caution, because while stressing the necessity of a wide meaning to be placed on the expression "other authorities", it must be realised 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. We may summarise the relevant tests gathered from the decision in the International Airport Authority case [(1979) 3 SCC 489] as follows:*

"(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. (SCC p. 507, para 14)

(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. (SCC p. 508, para 15)

(3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508, para 15)

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)

(5) If the functions of the corporation are of public importance and closely related to Governmental functions, it would be a

relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para 16)

(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." (SCC p. 510, para 18)

If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the International Airport Authority case [(1979) 3 SCC 489] , be an "authority" and, therefore, 'State' within the meaning of the expression in Article 12

10. *We find that the same view has been taken by Chinnappa Reddy, J. in a subsequent decision of this Court in the U.P. Warehousing Corporation v. Vijay Narayan [(1980) 3 SCC 459 : 1980 SCC (L&S) 453] and the observations made by the learned Judge in that case strongly reinforced the view we are taking particularly in the matrix of our constitutional system.*

11. *We may point out that it is immaterial for this purpose whether the corporation is created by a statute or under a statute. The test is whether it is an instrumentality or agency of the Government and not as to how it is created. The inquiry has to be not as to how the juristic person is born but why it has been brought into existence. The corporation may be a statutory corporation created by a statute or it may be a government Company or a Company formed under the Companies Act, 1956 or it may be a society registered under the Societies. Registration Act, 1860 or any other similar statute. Whatever be its genetical origin, it would be an "authority" within the meaning of Article 12 if it is an instrumentality or agency of the Government and that would have to be decided on a proper assessment of the facts in the light of the relevant factors. The concept of instrumentality or agency of the Government is not limited to a corporation created by a statute but is equally applicable to a Company or society and in a given case it would have to be decided, on a consideration of the relevant factors, whether the Company or society is an instrumentality or agency of the Government so as*

to come within the meaning of the expression "authority" in Article 12.

12. *It is also necessary to add that merely because a juristic entity may be an "authority" and therefore "State" within the meaning of Article 12, it may not be elevated to the position of "State" for the purpose of Articles 309, 310 and 311 which find a place in Part XIV. The definition of "State" in Article 12 which includes an "authority" within the territory of India or under the control of the Government of India is limited in its application only to Part III and by virtue of Article 36, to Part IV: it does not extend to the other provisions of the Constitution and hence a juristic entity which may be "State" for the purpose of Parts III and IV would not be so for the purpose of Part XIV or any other provision of the Constitution. That is why the decisions of this Court in S.L. Aggarwal v. Hindustan Steel Ltd. [(1970) 1 SCC 177 : (1970) 3 SCR 363] and other cases involving the applicability of Article 311 have no relevance to the issue before us."*

64. The above cited paragraphs of the aforementioned case clarify the position of law which answers the question regarding inclusion of the entities in the definition of the *other authorities* as mentioned in Article 12 of the Constitution of India.

65. In the above cited paragraphs, it is clear that an entity cannot be characterized as a State merely because it was established by a statute, rather is it also necessary to determine the intent for creation of such an entity by the Legislation.

66. The foregoing paragraphs also clarify that an entity can be construed as an authority if the Government of India has majority financial control which might lead to inference of the Government's entire control in the functioning of the said entity. Therefore, the structural features of an entity play a vital role in determining its

inclusion under the term *other authority* under Article 12 of the Constitution of India.

67. Before applying the principles discussed in the above said cases to the case at hand, this Court deems it important to discuss another landmark judgment delivered by the Hon'ble Supreme Court in ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111.**

68. In the aforesaid case, the Hon'ble Court expounded the conditions needed to be met for considering an organization as a State under Article 12. The relevant portions of the judgment are reproduced herein:

> *"**What is "authority" and when includible in "other authorities", re : Article 12***
> ***93.** 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.*
> ***94.** A reference to Article 13(2) of the Constitution is apposite. It provides—*
> *"13. (2) The State shall not make any law which takes away or abridges the rights 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 usage having in the territory of India the force of law. We have also referred to the speech of Dr B.R. Ambedkar in the Constituent Assembly explaining the purpose sought to be achieved by Article 12. In Ramana Dayaram Shetty case [(1979) 3 SCC 489 : AIR 1979 SC 1628] Bhagwati, J. (as he then was) stated that in RSEB case [AIR 1967 SC 1857 : (1967) 3 SCR 377] , the majority adopted the test that a 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".

In Sukhdev Singh case [(1975) 1 SCC 421 : 1975 SCC (L&S) 101 : (1975) 3 SCR 619] the principal reason which prevailed with A.N. Ray, C.J. 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 case [(1975) 1 SCC 421 : 1975 SCC (L&S) 101 : (1975) 3 SCR 619] , Mathew, J. held that the test laid down in RSEB case [AIR 1967 SC 1857 : (1967) 3 SCR 377] 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 case [AIR 1967 SC 1857 : (1967) 3 SCR 377] 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. A 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". (SCC p. 449, para 82)

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 the 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.

95. *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 government departments to statutory corporations, whilst retaining government 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)."

96. *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 the 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 been found to be an alter ego, a double or a proxy or a limb or an offspring 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.

97. *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 vice versa.*

98. *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 the 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 [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] 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 silentio, unconsciously and undeliberated. 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 [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] tests.

(2) The tests laid down in Ajay Hasia case [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] 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 the 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 the Government or deep and pervasive control of the Government so as to hold it to be an instrumentality or agency of the State.

99. *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 the 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.*

100. *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 the 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 jobwork, 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 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 the 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 the hands and voice of the State. There is no provision in the rules or the bye-laws 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 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 the 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 the Government which was transferred to CSIR. There was a Board of Scientific and Industrial Research and an Industrial Research Utilisation Committee. 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 the 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. CSIR is not the offspring or the blood and bones or the voice and hands of the Government. CSIR does not and cannot make law.

101. *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 latter 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 the 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 the Government's presence or participation is felt in the Society but such presence cannot be called a brooding presence or the overlordship of the Government. We are satisfied that the tests in Ajay Hasia case [Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 : 1981 SCC (L&S) 258] 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".

102. *On comparison, we find that in substance CSIR stands on a footing almost similar to the Institute of Constitutional and Parliamentary Studies (in TekrajVasandi v. Union of India [(1988) 1 SCC 236 : 1988 SCC (L&S) 300]) and the National Council of Educational Research and Training (in Chander Mohan Khanna v. NCERT [(1991) 4 SCC 578 : 1992 SCC (L&S) 109 : (1992) 19 ATC 71]) and those cases were correctly decided.*

103. *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 the 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 323-A 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 the 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 the relevant expression having been mechanically copied but factually unsupportable.

104. *For the foregoing reasons, we are of the opinion that the Council of Scientific and Industrial Research (CSIR) is not the State within the meaning of Article 12 of the Constitution. SabhajitTewary case [(1975) 1 SCC 485 : 1975 SCC (L&S) 99 : (1975) 3 SCR 616 : AIR 1975 SC 1329] was correctly decided and must hold the field. The High Court has rightly followed the decision of this Court in SabhajitTewary [(1975) 1 SCC 485 : 1975 SCC (L&S) 99 : (1975) 3 SCR 616 : AIR 1975 SC 1329] . The appeal is liable to be dismissed."*

69. Upon perusal of the above said paragraphs, it is evident that the Hon'ble Court adopted a more onerous stand where an entity was

required to be tested on three parameters *namely* financial, functional and administration.

70. The above cited judicial dictum also helps in understanding the contemporary nature of the interpretation of the said provision of the Constitution where the Hon'ble Court had propounded and included various factors for considering an entity to be an instrumentality of State thereby including it within the ambit of Article 12 of the Constitution.

71. Therefore, the only question for adjudication of the present issue is whether the respondent University conforms to the said three parameters and therefore, if the Government of India can be said to be controlling the respondent University in any manner.

72. During the course of arguments, the learned counsel appearing for the petitioners vehemently argued that for establishment of the respondent University**,** the land was provided by the Government and it also provided more than 50% funding for creating infrastructure for its smooth functioning. Therefore, concluding that the Government is controlling the respondent University and hence satisfying the conditions laid down by the Hon'ble Court in the cases discussed in the foregoing paragraphs.

73. In light of the same, this Court deems it necessary to analyze whether the Government of India holds any distinctive power in the functioning of the respondent University and if it can be held that the Government of India exerts dominant control over the administration of the respondent University because of its financial contribution for establishment of the respondent University.

74. Section 6 of the SAU Act provides for the constitution of the Governing Board entrusted to oversee the administration of the respondent University. The said provision reads as under:

> *"**6. Governing Board.**—(1) There shall be a Governing Board of the University consisting of two members from each of the Member States of the SAARC and the President of the University: Provided that until the first Governing Board is formed, the Inter-Governmental Steering Committee of the SAARC shall function as an interim Governing Board.*
> *(2) The Governing Board shall be headed by the Chairperson who shall be elected from amongst the members of the Governing Board.*
> *(3) The members of the Governing Board shall be selected in such manner and for such term as provided in Article 5 of the Schedule.*
> *(4) The President of the University shall be the ex officio member of the Governing Board.*
> *(5) The Governing Board shall be responsible for all the policies and directions of the University and management of its affairs.*
> *(6) The Chairperson of the Board shall exercise such powers as may be prescribed by the Statutes."*

75. The above cited provision clarifies the position of the member countries where an equal number of members from each country shall be appointed to the board entrusted and responsible for governing the functioning of the respondent University.

76. The sub clause 5 of the above said provision also clarifies that the board shall be responsible for formulation of the policies for the respondent University and it does not mention specific powers granted to the representatives of the Government of India in any manner.

77. Apart from the SAU Act, the Rules formulated for governance of the respondent University also clarifies the position of law where the prevalence of the legal instruments of the respondent University over any legislation has been clarified in the preamble itself. The preamble of the Rules framed by the SAARC standing committee and the Governing Board of the University reads as under:

> ***Preamble***
> *"In pursuance of the Agreement for Establishment of South Asian University signed at New Delhi on 4 April 2007, the Rules governing the University are laid down in this document. These Rules shall apply to the Main Campus, Regional Campuses and Centres of the University. Member States may be required to enact national legislations to enable establishment and functioning of the University. If such national legislations come in conflict with the Agreement and other agreed-upon Inter-Governmental legal agreed-upon instruments of the University, the provisions of the latter shall prevail."*

78. Upon perusal of both preamble of the Rules and Section 6 of the SAU Act, it is crystal clear that the Government of India does not hold any special position in the governing body and is considered equal to any other member state of SAARC.

79. While it is true that the land on which the respondent University has been established was provided by the Government of India and it also committed to provide funds for the development of infrastructure on the said land, however, still it does not enjoy a dominant position where it can be said that the functioning is controlled by the Government in any manner.

80. Furthermore, records placed before this Court does not anyhow satisfy the tests laid down by the Hon'ble Supreme Court in the previously discussed paragraphs and therefore, the three parameters namely financial, functional and administration are not controlled by the Government leading to rejection of the contentions of the learned counsel for the petitioners in this regard.

81. Therefore, the respondent University, even though created out of an Act of the Parliament, is not in control of the Government of India in any manner rather the role of the Government is limited to facilitation of establishment of the said University and therefore the actions of the respondent University are not accountable to the Government of India.

82. At this stage, this Court also deems it necessary to briefly deal with the settled position of law regarding ratification of international agreements, conventions in our Country.

83. As per settled principle of law, the treaties, agreements signed by the country are to be ratified by the Indian Government for its implementation in the country. The fact that the respondent University has been created out of an Act can be termed as an implementation of the practice as witnessed in ratifying the other treaties or agreement signed by the Government.

84. Hence, the character of the respondent University is that of an international institution and it is not functionally, administratively or financially controlled by the Government of India, and cannot be included under *other authority* as mentioned in Article 12 of the Constitution of India.

85. Therefore, the issue I is decided in favor of the respondent University, where the status of the University is that of an International entity and not under the ambit any *other authority* as mentioned under Article 12 of the Constitution of India. Hence, the respondent University is not a State as per Article 12 of the Constitution of India.

Issue II

86. Having dealt with the nature of the respondent University, the question left before this Court is whether the immunities provided to the officials of the respondent University *vide* notification dated 15th January, 2009, also includes the immunity to be tried in the Court established by the laws governing the citizens of this country and whether the respondent University can be judicially scrutinized under Article 226 of the Constitution.

87. After establishment of the United Nations in the year 1945, the Convention on privileges and immunities to the organization was organized and an Act was enacted to give effect to the decisions agreed upon by the member nations in the said Convention and the Convention on the Privileges and Immunities of the United Nations was adopted by the General Assembly of the United Nations on 13th February, 1946. The Article 2 of the said convention provides for ***'immunity from every form of legal process.'***

88. In pursuance of the same, the UN (Privileges and Immunities) Act, 1947 ('UN Act') was enacted by the Country to materialize the terms decided by the member nations to grant immunity and privileges to the officials and organizations having an international identity.

89. The Section 3 of the UN Act provides for powers to confer various privileges to an international organization. The said provision reads as under:

> *"**3. Power to confer certain privileges and immunities on other international organisation and their representatives and officers.**- Where in pursuance of any international agreement, convention or other instrument it is necessary to accord to any international organisation and its representatives and officers privileges and immunities in India similar to those contained in the provisions set out in the Schedule, the Central Government may, by notification 2* in the Official Gazette, declare that the provisions set out in the Schedule shall, subject to such modifications, if any, as it may consider necessary or expedient for giving effect to the said agreement, convention or other instrument, apply mutatis mutandis to the international organisation specified in the notification and its representatives and officers, and thereupon the said provisions shall apply accordingly and, notwithstanding anything to the contrary contained in any other law, shall in such application have the force of law in India."*

90. The above said provision empowers the member nations to enjoy certain privileges in the Country and get exempted from various legal liabilities in the territory where the said international entity is situated.

91. The said privileges and immunities were also extended to the respondent University, its president and other faculty members *vide* notification released by the Ministry of External Affairs on 15th January, 2009. The said notification reads as follows:

> *"MINISTRY OF EXTERNAL AFFAIRS*
> *NOTIFICATION*

New Delhi, the 15th January, 2009

S.O. 168(E) - Whereas an Agreement for the Establishment of the South Asian University was signed on behalf of the respective Governments of the Member States of the South Asian Association for Regional Co-operation on the 4th day of April, 2007;
AND Whereas, the Headquarters Agreement between the Government of the Republic of India and the SAARC Secretariat for the establishment of the South Asian University at New Delhi was signed on the 30th day of November 2008;
AND Whereas, the Inter-governmental Steering Committee of the SAARC has set up the Project Office at New Delhi for the purpose of doing necessary task for establishing the South Asian University;
AND Whereas, in pursuance of the decision of the Inter-governmental Steering Committee of the SAARC, it is expedient to accord the Project Office and officials thereof, and the South Asian University, its President, Registrar and faculty members the privileges and the immunities in India similar to those contained in Articles II, III, IV, V, VI and VII of the Schedule to the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947);
No Therefore, the Central Government in exercise of the powers conferred by Section 3 of the said act hereby declares that the provisions of Articles II, III, IV, V, VI and VII of the Schedule to the said Act shall apply mutatis mutandis to the Project Office and officials thereof, and the South Asian University, its President, Registrar and faculty members forgiving effect to the said Headquarters Agreement.

[F. No. L-106/47/2007]
Dr. KHEYA BHATTACHARYA, Jt. Secy."

92. The perusal of the above-mentioned notification clarifies that the respondent University has been granted immunity as provided for in the various Articles of the UN Act.

93. The counsel for the petitioner has contended that the privileges and immunities as provided in the notification issued by the ministry in the notification is only restricted to the President, it's faculty members and not the University itself, however, the notification itself clarifies that the privileges and the immunities are provided to the University as well.

94. Furthermore, the Section 14 of the SAU Act also clearly mentions that the University shall enjoy privileges granted under Article 3 of the UN Act. The said provision reads as under:

> *"**14. Privileges and immunities of President and academic staff**.—The University, the President and the members of the academic staff and, where applicable, their dependents or members of the family, shall enjoy such privileges and immunities as the Central Government may notify under section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947)."*

95. The literal interpretation of the above-mentioned provision clarifies the position of law where the contention of the petitioner regarding extension of the privileges and the immunities only to the President and the faculty members is rejected as the provision itself clarifies that the said immunities shall also be granted to the respondent University as well.

96. Another contention made by the counsel for the petitioners is regarding the kind of immunities provided to the University where it has been argued that the respondent University does not enjoy blanket protection rather has been given immunity from liabilities under customs, taxation etc.

97. The said contention has been countered by the learned counsel for the respondents by stating that the non-inclusion of certain things in the notification does not include that the Government intended to bring the respondent University under the ambit of writ jurisdiction.

98. In order to analyze the said issue, it is imperative for this Court to refer to certain principles enunciated by the Courts situated in the foreign jurisdiction and how they dealt with the similar issues.

99. In ***Mendaro v. World Bank*, 717, F.2d, 610, at 616 (D.C. Cir.1983),**the United States Court of Appeals, District of Columbia Circuit discussed the aspects related to the privileges granted to the World Bank and the employees working there and held as under:

> *"Position of the Bank with regard to judicial process*
> *Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities. No actions shall, however, be brought by members or persons acting for or deriving claims from members. The property and assets of the Bank shall, wheresoever located and by whomsoever held, be immune from all forms of seizure, attachment or execution before the delivery of final judgment against the Bank.*
> *Articles of Agreement, supra note 2, at art. VII § 3, 60 Stat. 1457-58, 2 U.N.T.S. 180.*
> *Mendaro argues that Article VII section 3 constitutes a broad waiver of immunity from all suits commenced in a court of competent jurisdiction located in specified territories, subject to two clearly expressed exceptions: the Bank is absolutely immune from (1) suits by members of the Bank, and (2) actions seeking prejudgment attachment of the Bank's assets. Given the clarity of these reservations in Article VII section 3, she argues that the members of the Bank knew how to limit their waiver of the Bank's immunity from judicial process. The absence of*

other limitations arguably implies that the Bank chose not to place other restrictions on its waiver of immunity. Thus, Mendaro theorizes that the members must have affirmatively intended to waive the Bank's immunity to all other types of suits, including those brought by its own employees.
A similar line of argument was relied on in Lutcher S.A. Celulose e Papel v. InterAmerican Development Bank. Construing an identical waiver provision in the Articles of Agreement of the Inter-American Development Bank, Lutcher held that the articles of the Inter-American Development Bank effectively waived its immunity to a suit for breach of a loan agreement brought by one of the Bank's debtors, despite the Bank's assertion that its articles only waived immunity to suits brought by bondholders, creditors, and beneficiaries of creditors. Mendaro argues that this generous construction of the articles of the InterAmerican Development Bank should be applied even more broadly to permit a suit brought by one of the World Bank's employees in a matter essentially arising out of an employee's charges of discrimination and breach of contract.

However, we are unable to read the somewhat clumsy and inartfully drafted language of Article VII section 3 — which the Lutcher court admitted was "hardly a model of clarity" — as evincing an intent by the members of the Bank to establish a blanket waiver of immunity from every type of suit not expressly prohibited by reservations in Article VII section 3. The interpretation urged by Mendaro is logical only if the waiver provisions are read in a vacuum, without reference to the interrelationship between the functions of the Bank set forth in the Articles of Agreement and the underlying purposes of international immunities. When the language of Article VII section 3 is approached from this viewpoint it is evident that the World Bank's members could only have intended to waive the Bank's immunity from suits by its debtors, creditors, bondholders, and those other potential plaintiffs to whom the Bank would have to subject itself to suit in order to achieve its chartered objectives. Since a waiver of immunity from

employees' suits arising out of internal administrative grievances is not necessary for the Bank to perform its functions, and could severely hamper its worldwide operations, this immunity is preserved by the members' failure expressly to waive it. Our reading of Article VII section 3 is both congruent with the other articles governing the Bank's relationship with its members and consistent with firmly established international treaty and customary law, United States case law, and the considered opinion of the United States Executive Branch.

Id. at 456.

1. Policies Underlying the Immunity of International Organizations

The strong foundation in international law for the privileges and immunities accorded to international organizations denotes the fundamental importance of these immunities to the growing efforts to achieve coordinated international action through multinational organizations with specific missions. It is well established under international law that "an international organization is entitled to such privileges and such immunity from the jurisdiction of a member state as are necessary for the fulfillment of the purposes of the organization, including immunity from legal process, from financial controls, taxes and duties." The premises, archives, and communications of international organizations are shielded from interference by member states, and international agreements often grant limited immunities to the officials of international organizations. One of the most important protections granted to international organizations is immunity from suits by employees of the organization in actions arising out of the employment relationship. Courts of several nationalities have traditionally recognized this immunity, and it is now an accepted doctrine of customary international law.

Like the other immunities accorded international organizations, the purpose of immunity from employee actions is rooted in the need to protect international organizations from unilateral control by a member nation over the activities

of the international organization within its territory. The sheer difficulty of administering multiple employment practices in each area in which an organization operates suggests that the purposes of an organization could be greatly hampered if it could be subjected to suit by its employees worldwide. But beyond economies of administration, the very structure of an international organization, which ordinarily consists of an administrative body created by the joint action of several participating nations, requires that the organization remain independent from the intranational policies of its individual members. Consequently, the charters of many international financial institutions contain express provisions designed to guarantee the neutral operation of the organization despite the political policies of the member nations or the individual backgrounds of the organizations' officers, and most large international organizations have established administrative tribunals with exclusive authority to deal with employee grievances"

100. The perusal of the above said judicial dictum clarifies that the intent for protection of the International organizations stems from the idea of non-controlling nature of a particular member country where the chances of controlling the functioning of the said entity are minimized.

101. In the present case as well, if the contention of the learned counsel for the petitioners is accepted, and it can be said that the said immunities are only restricted to the laws such as customs or taxes, the entire purpose for establishment for such a University gets defeated as it shall open floodgates for litigation against such entity.

102. The intergovernmental agreement as well as the preamble of the Rules formulated by the SAARC governing council already clarified the intent for establishment of an international institute. The term *non-state*

as mentioned in the agreement is of much importance for identification of the true nature of the respondent University.

103. Therefore, in order to ensure independent functioning of such an institution, it is pertinent to protect them from any litigation in the jurisdictions of a member state.

104. In light of the same, it is crystal clear that the respondent University enjoys the privileges granted to any other international institution and the same extends in the similar way as extended to other international entities in our Country.

105. Having dealt with the substantial question in the foregoing paragraphs, it is pertinent for this Court to deal with the question of whether the respondent University can still be considered under the ambit of Article 226 of the Constitution and therefore can be subject to scrutiny by the Constitutional Courts of this Country.

106. To answer the query posed before this Court, it is deemed necessary to refer to the settled position of law regarding inclusion of entities under Article 226 despite them not being a state under Article 12.

107. The settled position of law i.e. the scope of judicial interference under Article 226 of the Constitution of India, despite an entity not being a state under Article 12 has been expounded and elaborated by the Hon'ble Supreme Court and various other Constitutional Courts of the Country in numerous pronouncements.

108. The issue regarding scope of interference to the decisions taken by the public authority (*if arbitrary*) has been discussed by the Hon'ble Supreme Court in various judicial dicta where the Hon'ble Court

adjudicated upon the decision taken by such entities despite them not held to be under the definition of State under Article 12 of the Constitution.

109. In ***Janet Jeyapaul v. SRM University*, (2015) 16 SCC 530,** the Hon'ble Court dealt with the issue of whether the SRM University can be subjected to litigation under Article 226 despite it being a private entity and held as under:

> ***23.*** *To examine the question urged, it is apposite to take note of what De Smith, a well-known treatise, on the subject "Judicial Review" has said on this question [See de Smith's Judicial Review, 7th Edn., p. 127 (3-027) and p. 135 (3-038)].*
>
> *"AMENABILITY TEST BASED ON THE SOURCE OF POWER*
>
> *The courts have adopted two complementary approaches to determining whether a function falls within the ambit of the supervisory jurisdiction. First, the court considers the legal source of power exercised by the impugned decision-maker. In identifying the 'classes of case in which judicial review is available', the courts place considerable importance on the source of legal authority exercised by the defendant public authority. Secondly and additionally, where the 'source of power' approach does not yield a clear or satisfactory outcome, the court may consider the characteristics of the function being performed. This has enabled the courts to extend the reach of the supervisory jurisdiction to some activities of non-statutory bodies (such as self-regulatory organisations). We begin by looking at the first approach, based on the source of power."*
>
> *"JUDICIAL REVIEW OF PUBLIC FUNCTIONS*
>
> *The previous section considered susceptibility to judicial review based on the source of the power: statute or prerogative. The courts came to recognise that an approach based solely on the source of the public authority's power was too restrictive. Since 1987 they have developed an additional approach to determining susceptibility based on by the type of function performed by the decision-maker. The 'public function' approach is, since 2000, reflected in the Civil*

Procedure Rules: Rule 54.1(2)(a)(ii), defines a claim for judicial review as a claim to the lawfulness of 'a decision, action or failure to act in relation to the exercise of a public function'. (Similar terminology is used in the Human Rights Act, 1998 Section 6(3)(b) to define a public authority as 'any person certain of whose functions are functions of a public nature', but detailed consideration of that provision is postponed until later). As we noted at the outset, the term 'public' is usually a synonym for 'governmental'."

24. *The English Courts applied the aforesaid test in Reg. v. Panel on Take-overs and Mergers, ex p Datafin Plc. [Reg. v. Panel on Take-overs and Mergers, ex p Datafin Plc., 1987 QB 815 : (1987) 2 WLR 699 : (1987) 1 All ER 564 (CA)] , wherein Sir John Donaldson, MR speaking for three-Judge Bench of Court of Appeal (Civil Division), after examining the various case laws on the subject, held as under: (All ER p. 564g-h)*

"In determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but could also look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions the court had jurisdiction to entertain an application for judicial review of that body's decisions."

25. *In Andi Mukta case [Andi Mukta Sadguru Shree MuktajeeVandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] , the question before this Court arose as to whether mandamus can be issued at the instance of an employee (teacher) against a Trust registered under the Bombay Public Trusts Act, 1950 which was running an educational institution (college). The main legal objection of the Trust while opposing the writ petition of their employee was that since the Trust is not a statutory body and hence it cannot be subjected to the writ jurisdiction of the High Court. The High Court accepted the writ petition and issued mandamus directing the Trust to make payments towards the employee's*

claims of salary, provident fund and other dues. The Trust (Management) appealed to this Court.

26. *This Court examined the legal issue in detail. K. Jagannatha Shetty, J. speaking for the Bench agreed with the view taken by the High Court and held as under: (Andi Mukta case [Andi Mukta Sadguru Shree MuktajeeVandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] , SCC pp. 696-98 & 700, paras 11-12, 15 & 20)*

"11. Two questions, however, remain for consideration: (i) the liability of the appellants to pay compensation under Ordinance 120-E and (ii) the maintainability of the writ petition for mandamus as against the management of the college. ...

12. The essence of the attack on the maintainability of the writ petition under Article 226 may now be examined. It is argued that the management of the college being a trust registered under the Bombay Public Trusts Act is not amenable to the writ jurisdiction of the High Court. The contention in other words, is that the trust is a private institution against which no writ of mandamus can be issued. In support of the contention, the counsel relied upon two decisions of this Court: (a) Vaish Degree College v. Lakshmi Narain [Vaish Degree College v. Lakshmi Narain, (1976) 2 SCC 58 : 1976 SCC (L&S) 176] and (b) Dipak Kumar Biswas v. Director of Public Instruction [Dipak Kumar Biswas v. Director of Public Instruction, (1987) 2 SCC 252 : (1987) 3 ATC 505] . In the first of the two cases, the respondent institution was a Degree College managed by a registered cooperative society. A suit was filed against the college by the dismissed principal for reinstatement. It was contended that the Executive Committee of the college which was registered under the Cooperative Societies Act and affiliated to Agra University (and subsequently to Meerut University) was a statutory body. The importance of this contention lies in the fact that in such a case, reinstatement could be ordered if the dismissal is in violation of statutory obligation. But this Court refused to accept the contention. It was observed that the management of the college was not a statutory body since not created by or under a

statute. It was emphasised that an institution which adopts certain statutory provisions will not become a statutory body and the dismissed employee cannot enforce a contract of personal service against a non-statutory body.

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15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty, mandamus will not lie. These are two exceptions to mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of imparting education to students. They are subject to the rules and regulations of the affiliating University. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. [See M.P. Jain, The Evolving Indian Administrative Law (1983) 226] So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

***

20. The term 'authority' used in Article 226, in the context, must receive a liberal meaning unlike the term in Article 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Article 32. Article 226 confers power on the High Courts to issue writs for enforcement of the fundamental rights as well as non-fundamental rights. The words 'any person or authority' used in Article 226 are,

therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists, mandamus cannot be denied."

27. *This issue was again examined in great detail by the Constitution Bench in Zee Telefilms Ltd. v. Union of India [Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649] wherein the question which fell for consideration was whether the Board of Control for Cricket in India (in short "BCCI") falls within the definition of "State" under Article 12 of the Constitution. This Court approved the ratio laid down in Andi Mukta case [Andi Mukta Sadguru Shree MuktajeeVandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691] but on facts of the case held, by majority, that BCCI does not fall within the purview of the term "State". This Court, however, laid down the principle of law in paras 31 and 33 as under: (Zee Telefilms Ltd. case [Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649] , SCC p. 682)*

"31. Be that as it may, it cannot be denied that the Board does discharge some duties like the selection of an Indian cricket team, controlling the activities of the players and others involved in the game of cricket. These activities can be said to be akin to public duties or State functions and if there is any violation of any constitutional or statutory obligation or rights of other citizens, the aggrieved party may not have a relief by way of a petition under Article 32. But that does not mean that the violator of such right would go scot-free merely because it or he is not a State. Under the Indian jurisprudence there is always a just remedy for the violation of a right of a citizen. Though the remedy under Article 32 is not available, an aggrieved party can always seek a remedy under the ordinary course of law or by way of a writ petition under Article 226 of the Constitution, which is much wider than Article 32.

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33. Thus, it is clear that when a private body exercises its public functions even if it is not a State, the aggrieved person has a remedy not only under the ordinary law but also under the Constitution, by way of a writ petition under Article 226."

28. *It is clear from a reading of the ratio decidendi of the judgment in Zee Telefilms Ltd. [Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649] that firstly, it is held therein that BCCI discharges public duties and secondly, an aggrieved party can, for this reason, seek a public law remedy against BCCI under Article 226 of the Constitution of India*

29. *Applying the aforesaid principle of law to the facts of the case in hand, we are of the considered view that the Division Bench of the High Court erred in holding that Respondent 1 is not subjected to the writ jurisdiction of the High Court under Article 226 of the Constitution. In other words, it should have been held that Respondent 1 is subjected to the writ jurisdiction of the High Court under Article 226 of the Constitution.*

30. *This we say for the reasons that firstly, Respondent 1 is engaged in imparting education in higher studies to students at large. Secondly, it is discharging "public function" by way of imparting education. Thirdly, it is notified as a "Deemed University" by the Central Government under Section 3 of the UGC Act. Fourthly, being a "Deemed University", all the provisions of the UGC Act are made applicable to Respondent 1, which inter alia provides for effective discharge of the public function, namely, education for the benefit of the public. Fifthly, once Respondent 1 is declared as "Deemed University" whose all functions and activities are governed by the UGC Act, alike other universities then it is an "authority" within the meaning of Article 12 of the Constitution. Lastly, once it is held to be an "authority" as provided in Article 12 then as a necessary consequence, it becomes amenable to writ jurisdiction of the High Court under Article 226 of the Constitution.*

110. Upon perusal of the aforesaid paragraphs, it is made out that an entity can be subjected to purview of the Constitutional Courts if it discharges public function and the examination of the question of judicial review involves considering the legal source of power exercised by the decision-maker and the nature of the function being performed.

111. In the aforesaid case, it is also clarified that an entity being an educational institution can be subject to writ jurisdiction as it is engaged in imparting higher education, discharging public functions, and was declared as a Deemed University.

112. In the present case, the respondent University also discharges the functions of imparting education to both Indian and International students, therefore, this Court needs to deal with the aspect if the respondent University can be subjected to writ jurisdiction in light of the said function.

113. At this stage, it is appropriate for this Court to refer to a recent decision given by the Hon'ble Supreme Court in ***St. Mary's Education Society v. Rajendra Prasad Bhargava*, (2023) 4 SCC 498** whereby the Hon'ble Court extensively dealt with the issue and laid down certain points for inclusion of a private entity under the ambit of Article 226. The relevant parts of the said judgment are reproduced herein:

> ***52.*** *In the case on hand, the facts are similar. Rule 26(1) of the Affiliation Bye-laws, framed by CBSE, provides that each school affiliated with the Board shall frame Service Rules. Sub-rule (2) of it provides that a service contract will be entered with each employee as per the provision in the Education Act of the State/Union Territory, or as given in Appendix III, if not obligatory as per the State Education Act. These rules also*

provide procedures for appointments, probation, confirmation, recruitment, attendance representations, grant of leave, code of conduct, disciplinary procedure, penalties, etc. The model form of contract of service, to be executed by an employee, given in Appendix III, lays down that the service, under this agreement, will be liable to disciplinary action in accordance with the Rules and Regulations framed by the school from time to time. Only in case where the post is abolished or an employee intends to resign, Rule 31 of the Affiliation Bye-laws of the Board will apply. It may be noted that the above Bye-laws do not provide for any particular procedure for dismissal or removal of a teacher for being incorporated in the contract. Nor does the model form of contract given in Appendix III lay down any particular procedure for that purpose. On the contrary, the disciplinary action is to be taken in accordance with the Rules and Regulations framed by the school from time to time.

53. *On a plain reading of these provisions, it becomes clear that the terms and conditions mentioned in the Affiliation Bye-laws may be incorporated in the contract to be entered into between the school and the employee concerned. It does not say that the terms and conditions have any legal force, until and unless they are embodied in an agreement. To put it in other words, the terms and conditions of service mentioned in Chapter VII of the Affiliation Bye-laws have no force of law. They become terms and conditions of service only by virtue of their being incorporated in the contract. Without the contract they have no vitality and can confer no legal rights. The terms and conditions mentioned in the Affiliation Bye-laws have no efficacy, unless they are incorporated in a contract. In the absence of any statutory provisions governing the services of the employees of the school, the service of Respondent 1 was purely contractual. A contract of personal service cannot be enforced specifically. Therefore, Respondent 1 cannot find a cause of action on any breach of the law, but only on the breach of the contract. That being so, the appellant's remedy lies elsewhere and in no case the writ is maintainable.*

54. *Thus, the aforesaid order passed by this Court makes it very clear that in a case of retirement and in case of termination, no public law element is involved. This Court has held that a writ under Article 226 of the Constitution against a private educational institution shall be maintainable only if a public law element is involved and if there is no public law element is involved, no writ lies.*

55. *In T.M.A. Pai Foundation v. State of Karnataka [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] , an eleven-Judge Bench of this Court formulated certain points in fact to reconsider its earlier decision in Ahmedabad St. Xavier's College Society v. State of Gujarat [Ahmedabad St. Xavier's College Society v. State of Gujarat, (1974) 1 SCC 717 : 1 SCEC 125] , and also Unni Krishnan, J.P. v. State of A.P. [Unni Krishnan, J.P. v. State of A.P., (1993) 4 SCC 111 : 1 SCEC 645] , regarding the "right of the minority institution including administration of the student and imparting education vis-à-vis the right of administration of the non-minority student".*

56. *In the said case, very important points arose as follows : (T.M.A. Pai Foundation case [T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 : 2 SCEC 1] , SCC pp. 709-10, para 450)*

"450. ... Q. 5. (c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as conditions of affiliation to a university or board have to be complied with, but in the matter of day-to-day management, like appointment of staff, teaching and non-teaching and

administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for selection of teaching staff and for taking disciplinary action has to be evolved by the management itself. For redressing the grievances of such employees who are subjected to punishment or termination from service, a mechanism will have to be evolved and in our opinion, appropriate tribunals could be constituted, and till then, such tribunal could be presided over by a judicial officer of the rank of District Judge. The State or other controlling authorities, however, can always prescribe the minimum qualifications, salaries, experience and other conditions bearing on the merit of an individual for being appointed as a teacher of an educational institution.

Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State without interfering with overall administrative control of management over the staff, government/university representative can be associated with the Selection Committee and the guidelines for selection can be laid down. In regard to unaided minority educational institutions such regulations, which will ensure a check over unfair practices and general welfare of teachers could be framed."

57. *We now proceed to look into the two decisions of this Court in Ramesh Ahluwalia [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] and Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1 SCC (L&S) 854] respectively.*

58. *In Ramesh Ahluwalia [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] , the appellant therein was working as an administrative officer in a privately run educational institution and by way of disciplinary proceedings, was removed from service by the Managing Committee of the said educational institution. A writ petition was filed before the learned Single Judge of the High Court challenging the order of the disciplinary authority wherein he was removed from service.*

The writ petition was ordered [Ramesh Ahluwalia v. State of Punjab, 2009 SCC OnLine P&H 11755] to be dismissed in limine holding that the said educational institution being an unaided and a private school managed by the society cannot be said to be an instrument of the State. The appeal before the Division Bench also came to be dismissed [Ramesh Ahluwalia v. State of Punjab, 2010 SCC OnLine P&H 13111] . The matter travelled to this Court.

59. *The principal argument before this Court in Ramesh Ahluwalia case [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] was in regard to the maintainability of the writ petition against a private educational institution. It was argued on the behalf of the appellant therein that although a private educational institution may not fall within the definition of "State" or "other authorities/instrumentalities" of the State under Article 12 of the Constitution, yet a writ petition would be maintainable as the said educational institution could be said to be discharging public functions by imparting education. However, the learned counsel for the educational institution therein took a plea before this Court that while considering whether a body falling within the definition of "State", it is necessary to consider whether such body is financially, functionally and administratively dominated by or under the control of the Government. It was further argued that if the control is merely regulatory either under a statute or otherwise, it would not ipso facto make the body "State" within Article 12 of the Constitution. On the conspectus of the peculiar facts of the case and the submissions advanced, this Court held that a writ petition would be maintainable if a private educational institution discharges public functions, more particularly imparting education. Even by holding so, this Court declined to extend any benefits to the teacher as the case involved disputed questions of fact.*

60. *We take notice of the fact that in Ramesh Ahluwalia [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] the attention of the Hon'ble Judges was not drawn to the earlier*

decisions of this Court in K. Krishnamacharyulu [K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engg., (1997) 3 SCC 571 : 1997 SCC (L&S) 841] , Federal Bank [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] , Sushmita Basu v. Ballygunge Siksha Samity [Sushmita Basu v. Ballygunge Siksha Samity, (2006) 7 SCC 680 : 2006 SCC (L&S) 1741] , and Delhi Public School v. M.K. Gandhi [Delhi Public School v. M.K. Gandhi, (2015) 17 SCC 353 : (2017) 5 SCC (Civ) 461 : (2015) 3 SCC (L&S) 745] .

***61.** In Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1 SCC (L&S) 854] , this Court followed Ramesh Ahluwalia [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] referred to above.*

***62.** We may say without any hesitation that Respondent 1 herein cannot press into service the dictum as laid down by this Court in Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1 SCC (L&S) 854] as the said case is distinguishable. The most important distinguishing feature of Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1 SCC (L&S) 854] is that in the said case the removal of the teacher from service was subject to the approval of the State Government. The State Government took a specific stance before this Court that its approval was required both for the appointment as well as removal of the teacher. In the case on hand, indisputably the Government or any other agency of the Government has no role to play in the termination of Respondent 1 herein.*

***63.** In context with Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1 SCC (L&S) 854] , we remind ourselves of Bye-law 49(2) which provides that no order with regard to the imposition of major penalty shall be made by the disciplinary authority except after the receipt of the approval of the Disciplinary Committee. Thus unlike Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1*

SCC (L&S) 854] where approval was required of the State Government, in the case on hand the approval is to be obtained from the Disciplinary Committee of the institution. This distinguishing feature seems to have been overlooked by the High Court while passing the impugned order.

64. *In Marwari Balika Vidyalaya [Marwari Balika Vidyalaya v. Asha Srivastava, (2020) 14 SCC 449 : (2021) 1 SCC (L&S) 854] , the school was receiving grant-in-aid to the extent of dearness allowance. The appointment and the removal, as noted above, is required to be approved by the District Inspector of School (Primary Education) and, if any action is taken dehors such mandatory provisions, the same would not come within the realm of private element.*

65. *In Trigun Chand Thakur [Trigun Chand Thakur v. State of Bihar, (2019) 7 SCC 513 : (2019) 2 SCC (L&S) 378] , the appellant therein was appointed as a Sanskrit teacher and a show-cause notice was issued upon him on the ground that he was absent on the eve of Independence day and Teachers Day which resulted into a dismissal order passed by the Managing Committee of the private school. The challenge was made by filing a writ petition before the High Court which was dismissed on the ground that the writ petition is not maintainable against an order terminating the service by the Managing Committee of the private school. This Court held that even if the private school was receiving a financial aid from the Government, it does not make the said Managing Committee of the school a "State" within the meaning of Article 12 of the Constitution of India.*

66. *Merely because a writ petition can be maintained against the private individuals discharging the public duties and/or public functions, the same should not be entertained if the enforcement is sought to be secured under the realm of a private law. It would not be safe to say that the moment the private institution is amenable to writ jurisdiction then every dispute concerning the said private institution is amenable to writ jurisdiction. It largely depends upon the nature of the dispute and the enforcement of the right by an individual against such institution. The right which purely originates from*

a private law cannot be enforced taking aid of the writ jurisdiction irrespective of the fact that such institution is discharging the public duties and/or public functions. The scope of the mandamus is basically limited to an enforcement of the public duty and, therefore, it is an ardent duty of the court to find out whether the nature of the duty comes within the peripheral of the public duty. There must be a public law element in any action.

67. *Our present judgment would remain incomplete if we fail to refer to the decision of this Court in Ramakrishna Mission v. Kago Kunya [Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303] . In the said case this Court considered all its earlier judgments on the issue. The writ petition was not found maintainable against the Mission merely for the reason that it was found running a hospital, thus discharging public functions/public duty. This Court considered the issue in reference to the element of public function which should be akin to the work performed by the State in its sovereign capacity. This Court took the view that every public function/public duty would not make a writ petition to be maintainable against an "authority" or a "person" referred under Article 226 of the Constitution of India unless the functions are such which are akin to the functions of the State or are sovereign in nature.*

68. *Few relevant paragraphs of the said judgment are quoted as under for ready reference : (Ramakrishna Mission case [Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303] , SCC pp. 309-11 & 313, paras 17-22 & 25-26)*

"17. The basic issue before this Court is whether the functions performed by the hospital are public functions, on the basis of which a writ of mandamus can lie under Article 226 of the Constitution.

18. The hospital is a branch of the Ramakrishna Mission and is subject to its control. The Mission was established by Swami Vivekanand, the foremost disciple of Shri Ramakrishna Paramhansa. Service to humanity is for the organisation co-equal with service to God as is reflected in the motto "AtmanoMoksharthamJagadHitaya Cha". The main object of

the Ramakrishna Mission is to impart knowledge in and promote the study of Vedanta and its principles propounded by Shri Ramakrishna Paramahansa and practically illustrated by his own life and of comparative theology in its widest form. Its objects include, inter alia to establish, maintain, carry on and assist schools, colleges, universities, research institutions, libraries, hospitals and take up development and general welfare activities for the benefit of the underprivileged/backward/tribal people of society without any discrimination. These activities are voluntary, charitable and non-profit making in nature. The activities undertaken by the Mission, a non-profit entity are not closely related to those performed by the State in its sovereign capacity nor do they partake of the nature of a public duty.

19. The Governing Body of the Mission is constituted by members of the Board of Trustees of Ramakrishna Math and is vested with the power and authority to manage the organisation. The properties and funds of the Mission and its management vest in the Governing Body. Any person can become a member of the Mission if elected by the Governing Body. Members on roll form the quorum of the annual general meetings. The Managing Committee comprises of members appointed by the Governing Body for managing the affairs of the Mission. Under the Memorandum of Association and Rules and Regulations of the Mission, there is no governmental control in the functioning, administration and day-to-day management of the Mission. The conditions of service of the employees of the hospital are governed by service rules which are framed by the Mission without the intervention of any governmental body.

20. In coming to the conclusion that the appellants fell within the description of an authority under Article 226, the High Court placed a considerable degree of reliance on the judgment of a two-Judge Bench of this Court in Andi Mukta [Andi Mukta Sadguru Shree MuktajeeVandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691 : AIR 1989 SC 1607] . Andi Mukta [Andi Mukta Sadguru Shree MuktajeeVandas Swami Suvarna Jayanti

Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691 : AIR 1989 SC 1607] was a case where a public trust was running a college which was affiliated to Gujarat University, a body governed by the State legislation. The teachers of the University and all its affiliated colleges were governed, insofar as their pay scales were concerned, by the recommendations of the University Grants Commission. A dispute over pay scales raised by the association representing the teachers of the University had been the subject-matter of an award of the Chancellor, which was accepted by the Government as well as by the University. The management of the college, in question, decided to close it down without prior approval. A writ petition was instituted before the High Court for the enforcement of the right of the teachers to receive their salaries and terminal benefits in accordance with the governing provisions. In that context, this Court dealt with the issue as to whether the management of the college was amenable to the writ jurisdiction. A number of circumstances weighed in the ultimate decision of this Court, including the following:

20.1. The trust was managing an affiliated college.

20.2. The college was in receipt of government aid.

20.3. The aid of the Government played a major role in the control, management and work of the educational institution.

20.4. Aided institutions, in a similar manner as government institutions, discharge a public function of imparting education to students.

20.5. All aided institutions are governed by the rules and regulations of the affiliating University.

20.6. Their activities are closely supervised by the University.

20.7. Employment in such institutions is hence, not devoid of a public character and is governed by the decisions taken by the University which are binding on the management.

21. It was in the above circumstances that this Court came to the conclusion that the service conditions of the academic staff do not partake of a private character, but are governed by a right-duty relationship between the staff and the

management. A breach of the duty, it was held, would be amenable to the remedy of a writ of mandamus. While the Court recognised that "the fast expanding maze of bodies affecting rights of people cannot be put into watertight compartments", it laid down two exceptions where the remedy of mandamus would not be available : (SCC p. 698, para 15)

'15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to mandamus.'

22. Following the decision in Andi Mukta [Andi Mukta Sadguru Shree MuktajeeVandas Swami Suvarna Jayanti Mahotsav Smarak Trust v. V.R. Rudani, (1989) 2 SCC 691 : AIR 1989 SC 1607] , this Court has had the occasion to re-visit the underlying principles in successive decisions. This has led to the evolution of principles to determine what constitutes a "public duty" and "public function" and whether the writ of mandamus would be available to an individual who seeks to enforce her right.

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25. A similar view was taken in Ramesh Ahluwalia v. State of Punjab [Ramesh Ahluwalia v. State of Punjab, (2012) 12 SCC 331 : (2013) 3 SCC (L&S) 456 : 4 SCEC 715] , where a two-Judge Bench of this Court held that a private body can be held to be amenable to the jurisdiction of the High Court under Article 226 when it performs public functions which are normally expected to be performed by the State or its authorities.

26. In Federal Bank Ltd. v. Sagar Thomas [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] , this Court analysed the earlier judgments of this Court and provided a classification of entities against whom a writ petition may be maintainable : (SCC p. 748, para 18)

'18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an

instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.' "

69. *The aforesaid decision of this Court in Ramakrishna Mission [Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303] came to be considered exhaustively by a Full Bench of the High Court of Allahabad in Uttam Chand Rawat v. State of U.P. [Uttam Chand Rawat v. State of U.P., 2021 SCC OnLine All 724 : (2021) 6 All LJ 393] , wherein the Full Bench was called upon to answer the following question : (Uttam Chand Rawat case [Uttam Chand Rawat v. State of U.P., 2021 SCC OnLine All 724 : (2021) 6 All LJ 393] , SCC OnLine All para 1)*

"1. ...'(i) Whether the element of public function and public duty inherent in the enterprise that an educational institution undertakes, conditions of service of teachers, whose functions are a sine qua non to the discharge of that public function or duty, can be regarded as governed by the private law of contract and with no remedy available under Article 226 of the Constitution?"

70. *The Full Bench proceeded to answer the aforesaid question as under : (Uttam Chand Rawat case [Uttam Chand Rawat v. State of U.P., 2021 SCC OnLine All 724 : (2021) 6 All LJ 393] , SCC OnLine All paras 16-20)*

"16. The substance of the discussion made above is that a writ petition would be maintainable against the authority or the person which may be a private body, if it discharges public function/public duty, which is otherwise primary function of the State referred in the judgment of the Supreme Court in Ramakrishna Mission [Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303] and the issue under public law is involved. The aforesaid twin test has to be satisfied for entertaining writ petition under Article 226 of the Constitution of India.

17. From the discussion aforesaid and in the light of the judgments referred above, a writ petition under Article 226 of the Constitution would be maintainable against (i) the Government; (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

18. There is thin line between "public functions" and "private functions" discharged by a person or a private body/authority. The writ petition would be maintainable only after determining the nature of the duty to be enforced by the body or authority rather than identifying the authority against whom it is sought.

19. It is also that even if a person or authority is discharging public function or public duty, the writ petition would be maintainable under Article 226 of the Constitution, if Court is satisfied that action under challenge falls in the domain of public law, as distinguished from private law. The twin tests for maintainability of writ are as follows:

1. The person or authority is discharging public duty/public functions.

2. Their action under challenge falls in domain of public law and not under common law.

20. The writ petition would not be maintainable against an authority or a person merely for the reason that it has been created under the statute or is to be governed by regulatory provisions. It would not even in a case where aid is received unless it is substantial in nature. The control of the State is another issue to hold a writ petition to be maintainable against an authority or a person."

***71.** We owe a duty to consider one relevant aspect of the matter. Although this aspect which we want to take notice of has not been highlighted by Respondent 1, yet we must look into the same. We have referred to the CBSE Affiliation Bye-*

laws in the earlier part of our judgment. Appendix IV of the Affiliation Bye-laws is with respect to the minority institutions. Clause 6 of Appendix IV is with respect to the disciplinary control over the staff in a minority educational institution. We take notice of the fact that in Clause 6, the State has the regulatory power to safeguard the interests of their employees and their service conditions including the procedure for punishment to be imposed.

72. *For the sake of convenience and at the cost of repetition, we quote Clause 6 once again as under:*

*"**6. Disciplinary control over staff in Minority EducationalInstitutions**.—While the managements should exercise the disciplinary control over staff, it must be ensured that they hold an inquiry and follow a fair procedure before punishment is given. With a view to preventing the possible misuse of power by the management of the Minority Educational Institutions, the State has the regulatory power to safeguard the interests of their employees and their service conditions including procedure for punishment to be imposed."*

73. *It could be argued that as the State has regulatory power to safeguard the interests of the employees serving with the minority institutions, any action or decision taken by such institution is amenable to writ jurisdiction under Article 226 of the Constitution.*

74. *In the aforesaid context, we may only say that merely because the State Government has the regulatory power, the same, by itself, would not confer any such status upon the institution (school) nor put any such obligations upon it which may be enforced through issue of a writ under Article 226 of the Constitution. In this regard, we may refer to and rely upon the decision of this Court in Federal Bank [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] . While deciding whether a private bank that is regulated by the Banking Regulation Act, 1949 discharges any public function, this Court held thus : (Ramakrishna Mission case [Ramakrishna Mission v. Kago Kunya, (2019) 16 SCC 303] , SCC pp. 315-16, paras 33-35)*

"33. ...'33. ...'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 do not 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.' (Federal Bank case [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] , SCC pp. 758-59, para 33)

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. Saksena [K.K. Saksena 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."

75. *We may sum up our final conclusions as under:*

75.1. *An application under Article 226 of the Constitution is maintainable against a person or a body discharging public duties or public functions. The public duty cast may be either statutory or otherwise and where it is otherwise, the body or the person must be shown to owe that duty or obligation to the public involving the public law element. Similarly, for ascertaining the discharge of public function, it must be established that the body or the person was seeking to achieve the same for the collective benefit of the public or a section of it and the authority to do so must be accepted by the public.*

75.2. *Even if it be assumed that an educational institution is imparting public duty, the act complained of must have a direct nexus with the discharge of public duty. It is indisputably a public law action which confers a right upon the aggrieved to invoke the extraordinary writ jurisdiction under Article 226 for a prerogative writ. Individual wrongs or breach of mutual contracts without having any public element as its integral part cannot be rectified through a writ petition under Article 226. Wherever Courts have intervened in their exercise of jurisdiction under Article 226, either the service conditions were regulated by the statutory provisions or the employer had the status of "State" within the expansive definition under Article 12 or it was found that the action complained of has public law element.*

75.3. *It must be consequently held that while a body may be discharging a public function or performing a public duty and thus its actions becoming amenable to judicial review by a constitutional court, its employees would not have the right to invoke the powers of the High Court conferred by Article 226 in respect of matter relating to service where they are not*

governed or controlled by the statutory provisions. An educational institution may perform myriad functions touching various facets of public life and in the societal sphere. While such of those functions as would fall within the domain of a "public function" or "public duty" be undisputedly open to challenge and scrutiny under Article 226 of the Constitution, the actions or decisions taken solely within the confines of an ordinary contract of service, having no statutory force or backing, cannot be recognised as being amenable to challenge under Article 226 of the Constitution. In the absence of the service conditions being controlled or governed by statutory provisions, the matter would remain in the realm of an ordinary contract of service.

75.4. *Even if it be perceived that imparting education by private unaided school is a public duty within the expanded expression of the term, an employee of a non-teaching staff engaged by the school for the purpose of its administration or internal management is only an agency created by it. It is immaterial whether "A" or "B" is employed by school to discharge that duty. In any case, the terms of employment of contract between a school and non-teaching staff cannot and should not be construed to be an inseparable part of the obligation to impart education. This is particularly in respect to the disciplinary proceedings that may be initiated against a particular employee. It is only where the removal of an employee of non-teaching staff is regulated by some statutory provisions, its violation by the employer in contravention of law may be interfered with by the Court. But such interference will be on the ground of breach of law and not on the basis of interference in discharge of public duty.*

75.5. *From the pleadings in the original writ petition, it is apparent that no element of any public law is agitated or otherwise made out. In other words, the action challenged has no public element and writ of mandamus cannot be issued as the action was essentially of a private character.*

76. *In view of the aforesaid discussion, we hold that the learned Single Judge [Rajendra Prasad Bhargava v. Union of India, 2017 SCC OnLine MP 2337] of the High Court was justified in*

taking the view that the original writ application filed by Respondent 1 herein under Article 226 of the Constitution is not maintainable. The appeal court could be said to have committed an error in taking a contrary view.

114. The aforesaid case clarifies the current position of law where the Hon'ble Court had dealt with the issue of subjecting an unaided private minority school to the writ jurisdiction under Article 226.

115. The perusal of the aforesaid case also clarifies that even if an educational institution is assumed to be performing a public duty, any action complained of must have a direct connection with the discharge of that a public duty.

116. Furthermore, the Hon'ble Court also clarified that the availability of the extraordinary writ jurisdiction under Article 226 for a prerogative writ is contingent upon the existence of a public law action, where individual wrongs or breaches of mutual contracts without a public element cannot be rectified through a writ petition.

117. Therefore, this Court is bound to hold that the employment matters remain within the realm of an ordinary contract of service and are not amenable to challenge under Article 226 of the Constitution.

118. In the present case, it is important to test whether the factual matrix are similar to those cases as dealt with by the Hon'ble Court in the aforesaid cases.

119. Before delving into the same, this Court deems it necessary to reiterate that the respondent University was established out of an intergovernmental agreement between the SAARC nations, and despite being signatory to the said agreement, our country does not hold any

special position in functioning, finance and governing of the respondent University.

120. Since, the position of the respondent University is clear and undisputed in this aspect; this Court shall now deal with the question of whether the law laid down by the Hon'ble Supreme Court in the previously discussed cases can be held to be binding on the case at hand.

121. The factual matrix of the instant case makes if amply clear that the petitioners are the employees of the respondent University and are entrusted to discharge the role of Assistant professors in the respondent University.

122. It is no doubt that the said function is an integral part for smooth and effective functioning of the respondent University, however, the contract governing the said employees does not carve out of a statutory provision rather finds its source in the rules and regulations made by the standing committee and the governing council comprised of members from the respective member states of SAARC.

123. The said regulations and rules made by the said governing council are neither mandated by the UGC nor notified by the Government of India, therefore, the same do not derive their power from anything stemming out of a Government body and the same makes it different than the entities held to under the realm of Article 226 by the Hon'ble Supreme Court.

124. Now coming to the question of a remedy available to the petitioners. As per material on record, the contract signed between the parties provides for referral of a dispute to an Arbitral Tribunal where the

disputes arising out of an employment agreement shall be dealt with by such a tribunal.

125. The same has been duly mentioned in Section 26 of the SAU Act and the Rule 25 of the respondent University. Both the provisions are reproduced herein for reference:

> *"**26. Conditions of service of employees.**—(1) Every employee of the University shall be appointed under a written contract, which shall be lodged with the University and a copy of which shall be furnished to the employee concerned. 9 (2) Any dispute arising out of the contract between the University and any employee shall be referred to the Tribunal for Arbitration constituted for that purpose. (3) The decision of the Tribunal shall be final and no suit shall lie in any court in respect of the matters decided by the Tribunal. (4) The procedure for regulating the work of the Tribunal under sub-section (2) shall be prescribed by the Statutes.*
>
> ***RULE 25: Condition of Service of Employees***
> *25.1 Every employee of the University shall be appointed under a written contract, which shall be lodged with the University and a copy thereof shall be furnished to the employee concerned.*
> *25.2 Any dispute arising out of a contract between the University and any employee shall, at the request of the employee concerned, be referred to a Tribunal of Arbitration consisting of one member nominated by the employee concerned, one person nominated by the University and an umpire appointed by the Governing Board, who would serve as the Chairperson of the Tribunal, as laid down in Byelaws. The decision of the Tribunal shall be final."*

126. The above-mentioned provisions clearly settle the position regarding adjudication of the disputes between an employee and the

University. Therefore, it cannot be said that the petitioners are deprived of any remedy if the respondent University is not subject to the writ jurisdiction.

127. The material on record, i.e. the appointment letters issued to the petitioners also clarifies the position regarding the same where the employment agreement specifically mentions about the adjudication of the issue by an Arbitral Tribunal. One such appointment letters issued to one of the petitioners reads as under:

> *"EMPLOYMENT CONTRACT FOR TEACHERS*
> *The Employment Contract (the "Contract") is made on this the 5th day of August, 2011 between the South Asian University being a body corporate constitute under SAARC Agreement for the Establishment of South Asian University, (hereinafter called the 'University') of the first part and Dr Snehashish Bhattacharya (hereinafter called the 'Teacher') of the second part.*
> *WHEREAS, the University desired to secure and maintain the services of the Teacher and both parties desire to enter into a Contract of Employment upon the terms and conditions hereinafter set forth.*
> *NOW, THEREFORE, in consideration of the premises and the mutual agreements hereinafter contained, the parties hereby agree as follows:*
> *1. That the University hereby appoints Dr. Snehashish Bhattacharya as a Assistant Professor of the University with effect from the date the teacher takes charge of the duties of his/her post i.e. 21st July, 2011 and the teacher hereby accepts the engagement, and undertakes to take such part in the activites of the University and perform such duties in the University as may be required by and in accordance with the SAARC Inter-Governmental Agreement, the Rules, Regulations and Byelaws etc. framed thereunder as in force, from time to time, whether the same relate to organization of instruction or teaching or research or the instruction or teaching or*

examination of students or their discipline or their welfare, and to act under the direction of the authorities of the University.

2. a) That the appointment of the Teacher shall be on a contract basis for a period of five years with the first year as probation period.

b) The University shall assess the suitability of the Teacher for confirmation as permanent faculty member at least three months before the expiry of the contract.

c) A faculty member on five year contract may however request the University to initiate th process of his/her assessment for confirmation earlier but not before completing the fourth year of contract.

d) That if the University is satisfied with suitability of the Teacher for confirmation, he/she shall be confirmed in the post, to which he/she was appointed.

e) In case the University decides not to confirm the Teacher in accordance with 2 (d) above the teacher may either be offered (i) extension of the contract for a specified duration to be followed by another assessment or (ii) shall be informed in writing and given a termination notice of one year. For teachers not confirmed, the overall period of employment including notice period will not exceed 5 years.

f) The contract would not prevent a teacher from being considered for promotion to a higher position during the contract period through the application of promotion rules that the university intends to evolve near future.

3. That the Teacher shall be a full time teacher of the University and, unless the contract is terminated by the Executive Council or by the Teacher himself/herself, shall continue in the service of the University until the end of contract or until he/she completes such age as may be prescribed by the Rules/Regulations/Byelaws of the University.

4. a) The University shall pay to the Teacher during the continuance of his/her engagement hereunder as remuneration of hs/her services a salary of US$ 17000 per year in equivalent Indan Rupees to be raised by 3% annual increment at the end of every 12 months period to a maximum salary of US$ 25000 per year. The salary would be paid in Indian Rupees on a

monthly basis, generally on the last working day of every month.

b) The University shall also pay to the Teacher House Rent Allowance, as admissible under Regulations, in case the Teacher does not avail of the accommodation provided by the University.

c) The University shall contribute an additional 10% of the basic salary in pension fund of the Teacher's choice.

d) Health benefits, dearness Allowance, Leave and Leave encashment, Gratuity, etc. will be governed as per Regulation and Byelaws of the University in force from time to time.

e) Salary and Allowances of the Teacher will be exempted from any income tax levied by the Government of India.

5. That the teacher agrees to be bound by the SAARC Inter-Governmental Agreement, Rules, Regulations and Byelaws in force in the University at any time.

6. That the teacher shall devote his/her wholetime to the service of the University and shall not, without the written permission of the University, engage, directly or indirectly, in any trade or business whatsoever, or in any private tuition or other work to which emoluments or honorarium is attached. However, this prohibition shall not apply to work undertaken in connection with the examinations of Universities or learned bodies, meetings called by professional bodies, or to any literary work or publication or radio talk or extension lectures or with the permission of the President, to any other academic work.

7. Any dispute arising out of the contract shall be settled in accordance with the Provisions of Rule 25.2 of the University (reproduced below):

"Any dispute arising out of a contract between the University and any employee shall, at the request of the employee concerned, be referred to a Tribunal of Arbitration consisting of one member nominated by the employee concerned, one person nominated by the University and an umpire appointed by the Executive Council and the decision of the Tribunal shall be final. "

8. The teacher may at any time, terminate his/her engagement by giving the Executive Council three months' noticewriting or

by payment of an amount equal to three months salary, as the case may be in lieu of the notice.
9. On the termination of this engagement, for whatever cause, the teacher shall return to the University all books, apparatuses, records and such other articles belonging to the University as may be due from him/her.
In witness whereof the parties hereto affix their hands and seal."

128. Upon perusal of the extracts of the appointment letter, it is clear that the petitioners agreed to the said terms while joining the respondent University and thereby signed the employment agreement.

129. The factual matrix of the current case clearly establishes that the petitioners chose not to avail a remedy provided to them, rather approached this Court therefore, bypassing the rules and procedures prescribed by the laws governing the respondent University which were duly agreed by the petitioners at the time of joining the respondent University.

130. In ***Hintermann v. Union de l'Europeoccidentale*, Courd'appel de Paris, 10 April 1990,** the French Court of Appeal upheld the immunity granted to an international organization and dismissed the contention regarding denial of justice if the dispute between an employee and employer is not adjudicated by a Court. In the subsequent cases, the French Courts had upheld the said decisions rendered in the aforesaid case and therefore, the issue is settled in the said jurisdiction and a persuasive value can be drawn by this Court in the said regard.

131. In ***UNESCO v. Boulois, Tribunal de grande instance de Paris (ord. Réf.),* 20 October 1997,** the French Court had rejected the immunity granted to the UNESCO and held that the grant of such

immunity shall lead to denial of justice and is against the public policy, however, the petitioner/appellant in the said case did not have any other remedy available for his rescue therefore leading to acceptance of the appeal against the UNESCO. Therefore, acceptance of an appeal against an international entity was done in different circumstances and due to absence of any other remedy for adjudication of the dispute.

132. In the instant case, it is not disputed that the petitioners had the option to refer the matter for Arbitration; however, they directly approached the writ Court having no jurisdiction over the respondent University contending that the availability of an alternative remedy does not preclude their right to approach this Court.

133. Even though the learned counsel for the petitioners has referred to a number of cases to substantiate the argument of approaching this Court and not preferring the matter to be adjudicated by the Arbitral Tribunal, this Court does not agree with the contentions of the learned counsel as the petitioners had known about the international character of the respondent University and agreed to the sole jurisdiction of the Arbitral Tribunal in case of dispute arising against the University.

134. In ***M/S South Indian Bank Ltd. and Drs. v. Naveen Mathew Philip and Anr. Etc.*** **(2023) SCC OnLine 435,** the Hon'ble Supreme Court discussed the intent of the legislature for providing a dispute redressal mechanism in the legislation itself and held as under:

> *"**17.** We shall reiterate the position of law regarding the interference of the High Courts in matters pertaining to the SARFAESI Act by quoting a few of the earlier decisions of this Court wherein the said practice has been deprecated while requesting the High Courts not to entertain such cases.*

• *Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733,*

"18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (i) the State (Government); (ii) an authority; (iii) a statutory body; (iv) an instrumentality or agency of the State; (v.) a company which is financed and owned by the State; (vi) a private body run substantially on State funding; (vii) a private body discharging public duty or positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function.

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26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though the case of nationalized banks stands on a different footing. There may well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lakhs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking

activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The banking companies have not been set up for the purposes of building the economy of the State; on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guidelines and not a participatory dominance or control over the affairs of the company. For other companies in general carrying on other business activities, maybe manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement or the interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. Care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production, which is important for the economy, may not go down, yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

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 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."

• United Bank of India v. SatyawatiTondon, (2010) 8 SCC 110,

"42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the

remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal,

revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

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55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

• *State Bank of Travancore v. Mathew K.C., (2018) 3 SCC 85,*

"5. We have considered the submissions on behalf of the parties. Normally this Court in exercise of jurisdiction under Article 136 of the Constitution is loath to interfere with an interim order passed in a pending proceeding before the High Court, except in special circumstances, to prevent manifest injustice or abuse of the process of the court. In the present case, the facts are not in dispute. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions as observed in CIT v. ChhabilDass Agarwal [(2014) 1 SCC 603], as follows : (SCC p. 611, para 15)

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in ThansinghNathmal v. Supt.

of Taxes [AIR 1964 SC 1419], Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433 : 1983 SCC (Tax) 131] and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

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8. The Statement of Objects and Reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. Narasimhan Committee I and II as also the Andhyarujina Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as "the DRT Act") with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

9. Even prior to the SARFAESI Act, considering the alternate remedy available under the DRT Act it was held in Punjab

National Bank v. O.C. Krishnan [(2001) 6 SCC 569] that : (SCC p. 570, para 6)

"6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

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15. It is the solemn duty of the court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in United Bank of

India v. SatyawatiTondon [(2010) 8 SCC 110 :(2010) 3 SCC (Civ) 260], has also not been kept in mind before passing the impugned interim order : (SCC pp. 123-24, para 46)

"46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. AntarimZilaParishad [AIR 1969 SC 556], Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1] and HarbanslalSahnia v. Indian Oil Corpn. Ltd. [(2003) 2 SCC 107] and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

• Phoenix ARC (P) Ltd. v. Vishwa Bharati Vidya Mandir, (2022) 5 SCC 345,

"18. Even otherwise, it is required to be noted that a writ petition against the private financial institution - ARC - the appellant herein under Article 226 of the Constitution of India against the proposed action/actions under Section 13(4) of the SARFAESI Act can be said to be not maintainable. In the present case, the ARC proposed to take action/actions under the SARFAESI Act to recover the borrowed amount as a secured creditor. The ARC as such cannot be said to be performing public functions which are normally expected to be performed by the State authorities. During the course of a commercial transaction and under the contract, the bank/ARC lent the money to the borrowers herein and therefore the said

activity of the bank/ARC cannot be said to be as performing a public function which is normally expected to be performed by the State authorities. If proceedings are initiated under the SARFAESI Act and/or any proposed action is to be taken and the borrower is aggrieved by any of the actions of the private bank/bank/ARC, borrower has to avail the remedy under the SARFAESI Act and no writ petition would lie and/or is maintainable and/or entertainable. Therefore, decisions of this Court in Praga Tools Corpn. v. C.A. Imanual, [(1969) 1 SCC 585] and Ramesh Ahluwalia v. State of Punjab, [(2012) 12 SCC 331 : (2013) 3 SCC (L&S) 45 : 4 SCEC 715] relied upon by the learned counsel appearing on behalf of the borrowers are not of any assistance to the borrowers.

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21. Applying the law laid down by this Court in State Bank of Travancore v. Mathew K.C., [(2018) 3 SCC 85 :(2018) 2 SCC (Civ) 41] to the facts on hand, we are of the opinion that filing of the writ petitions by the borrowers before the High Court under Article 226 of the Constitution of India is an abuse of process of the court. The writ petitions have been filed against the proposed action to be taken under Section 13(4). As observed hereinabove, even assuming that the communication dated 13-8-2015 was a notice under Section 13(4), in that case also, in view of the statutory, efficacious remedy available by way of appeal under Section 17 of the SARFAESI Act, the High Court ought not to have entertained the writ petitions. Even the impugned orders passed by the High Court directing to maintain the status quo with respect to the possession of the secured properties on payment of Rs. 1 crore only (in all Rs. 3 crores) is absolutely unjustifiable. The dues are to the extent of approximately Rs. 117 crores. The ad interim relief has been continued since 2015 and the secured creditor is deprived of proceeding further with the action under the SARFAESI Act. Filing of the writ petition by the borrowers before the High Court is nothing but an abuse of process of court. It appears that the High Court has initially granted an ex parte ad interim order mechanically and without assigning any reasons. The

High Court ought to have appreciated that by passing such an interim order, the rights of the secured creditor to recover the amount due and payable have been seriously prejudiced. The secured creditor and/or its assignor have a right to recover the amount due and payable to it from the borrowers. The stay granted by the High Court would have serious adverse impact on the financial health of the secured creditor/assignor. Therefore, the High Court should have been extremely careful and circumspect in exercising its discretion while granting stay in such matters. In these circumstances, the proceedings before the High Court deserve to be dismissed."

• *Varimadugu Obi Reddy v. B. Sreenivasulu, (2023) 2 SCC 168,*

"36. In the instant case, although the respondent borrowers initially approached the Debts Recovery Tribunal by filing an application under Section 17 of the SARFAESI Act, 2002, but the order of the Tribunal indeed was appealable under Section 18 of the Act subject to the compliance of condition of pre-deposit and without exhausting the statutory remedy of appeal, the respondent borrowers approached the High Court by filing the writ application under Article 226 of the Constitution. We deprecate such practice of entertaining the writ application by the High Court in exercise of jurisdiction under Article 226 of the Constitution without exhausting the alternative statutory remedy available under the law. This circuitous route appears to have been adopted to avoid the condition of pre-deposit contemplated under 2nd proviso to Section 18 of the 2002 Act."

18. *While doing so, we are conscious of the fact that the powers conferred under Article 226 of the Constitution of India are rather wide but are required to be exercised only in extraordinary circumstances in matters pertaining to proceedings and adjudicatory scheme qua a statute, more so in commercial matters involving a lender and a borrower, when the legislature has provided for a specific mechanism for appropriate redressal."*

135. The perusal of the above said paragraphs clearly establishes that a person has to approach the appropriate forum for adjudication of the dispute where the referral to a dispute redressal forum is itself provided for in the legislation itself.

136. In the above said case, the Hon'ble Court specifically expressed its displeasure when borrowers circumvented statutory remedies by directly approaching High Courts under Article 226, without exhausting the alternative statutory remedies available.

137. Therefore, it is crystal clear that the Court held that there should be adherence to statutory remedies, and advised the High Courts to exercise caution in the grant of relief by avoiding the abuse of Article 226 jurisdiction in matters.

138. While it is true that the above cited case is not applicable to the facts of the instant case and for adjudication of the issue at hand, an analogy needs to be drawn with the intent of the legislature in providing a mechanism for redressal of the dispute in the matters pertaining to dispute with the respondent University.

139. As emphasized earlier, the SAU Act and the Regulations specifically provides for jurisdiction of the Arbitral Tribunal for adjudication of the disputes between the parties, therefore, approaching this Court under Article 226 of the Constitution is not a remedy available to the petitioners.

140. Furthermore, the Regulation also empowers the Executive Council of the respondent University to address the grievances *(if any)* of the employees and deal with the same, however, the petitioners did not

approach the Council rather directly filed the present petition thereby, neglecting the procedure established for redressal of the dispute.

141. The discussion in the foregoing paragraphs also makes it evident that the petitioners failed to avail the remedy available to them in the statue and duly agreed by them during the signing of the employment contract, they rather deemed it appropriate to file the present petition which cannot be held maintainable as per the exemption provided to the University under the SAU Act and the Headquarters Agreement.

142. In light of the same, this Court is of the considered opinion that the privileges granted by the Ministry of External Affairs *vide* notification dated 15th January, 2009 extends to the respondent University where the University is exempted from getting sued by the employees in the Court of law established in India and the petitioners have an effective remedy for redressal of their dispute against the respondent University and hence, the question whether the respondent University acted in *bona fide* can only be answered by the Arbitral Tribunal when the issue is heard on merits .

143. Therefore, the issue II is decided in favor of the respondent University, and this Court deems it necessary to hold that the respondent University has the privilege and the immunity from being subject to the writ jurisdiction conferred to this Court under Article 226 of the Constitution of India.

CONCLUSION

144. The interpretation of the term *other authority* has evolved over a period of time where the judicial dictum, at various instances has decided

for inclusion or exclusion of various authorities under Article 12 of the Constitution of India.

145. The respondent University being an organization deriving its powers from an intergovernmental agreement dated 4th April, 2007, is an international organization where the Government of India does not hold any control over its functioning, administration and finances despite it being situated in India. The arguments advanced by the petitioner does not satisfy this Court that the respondent University is a state for the purpose of adjudication of dispute by the Writ Court and therefore, it cannot be brought under the judicial scrutiny by this Court.

146. The issue concerning the immunity of international organizations, in particular in the context of employment disputes, are of utmost importance, and existence of a forum for settling disputes between international organizations and their employees is thereby necessary. The existence of such a mechanism for redressal of the dispute between the employees and the respondent University satisfies this Court that the petitioners have an effective remedy to redress their grievances, therefore, this Court does not have jurisdiction to adjudicate the issue.

147. Even though the settled position of law regarding inclusion of Educational institutions under the ambit of Article 226 of the Constitution of India has been made clear by the Hon'ble Supreme Court in the cases discussed above, it is imperative to note that all the parties subjected to the said jurisdiction were not established out of an international agreement signed between the nations and therefore do not enjoy the status of an international organization, therefore, the same cannot be made applicable to the respondent University.

148. In light of the same, this Court is of the considered opinion that the present writ is not maintainable as the respondent University enjoys the status of an international organization having privileges and immunities and the same is evident from the headquarters agreement signed by the member countries of SAARC, the SAU Act enacted by the Parliament of India and the notification issued by the Ministry of External Affairs on 15th January, 2009.

149. Therefore, the present petition, being non-maintainable, is liable to be dismissed and the petitioners are advised to approach the appropriate forum i.e. the Arbitral Tribunal for adjudication of the dispute on merits.

150. Accordingly, the petition is dismissed, along with pending applications (if any).

151. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

JANUARY 23, 2024
SV/AV/db