2024:DHC:3091

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

% **Reserved on : 22nd January, 2024**
Pronounced on: 16th April, 2024

\+ W.P.(C) 5864/2021 and CM APPL. Nos. 18418/2021, 9216/2022, 40171/2022, 14569/2023 and 40498/2023

SHRI MUKESH KUMAR JHA AND ORS ..... Petitioners
Through: Mr.Sanjoy Ghosh, Sr. Advocate with Mr.Fidel Sebastian and Mr.Rohan, Advocate

versus

MANOHAR PARRIKAR INSTITUTE FOR DEFENCE STUDIES AND ANALYSES ..... Respondent
Through: Mr.Raj Shekhar Rao, Senior Advocate with Ms.Gauri Puri, Advocate.

\+ W.P.(C) 7487/2021 and CM APPL. Nos. 55616/2023 & 40177/2022

MRS. ASHA ..... Petitioner
Through: Mr.Sanjay Ghosh, Sr. Advocate with Mr.Fidel Sebastian and Mr.Rohan, Advocates

versus

MANOHAR PARRIKAR INSTITUTE FOR DEFENCE STUDIES AND ANALYSES (MP-IDSA) ..... Respondent
Through: Mr.Raj Shekhar Rao, Senior Advocate with Ms.Gauri Puri, Advocate.

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 batch of petitions were employed in various capacities as administrative and technical staff with the respondent ('respondent Institute' hereinafter) between the period ranging from the year 1998 to 2010 and all the petitioners have completed at least 10 years of service with the respondent Institute.

2. The respondent Institute is a body established in the year 1965 and registered as a society under the Societies Registration Act No. XXI of 1860 (Punjab Amendment Act, 1957) ('the Act' hereinafter) as extended to Delhi. The respondent Institute is dedicated to objective research and policy relevant studies on all aspects of defense and security with a mission to promote national and international security through generation and dissemination of knowledge on defense and security related issues.

3. In the year 2021, the petitioners collectively served a legal notice dated 9th March, 2021 to the respondent Institute seeking regularization of their services as they have worked for almost 10 years, however, the respondent Institute did not reply to the same.

4. Thereafter, the petitioners filed the instant petitions seeking regularization of their services.

5. Since the factual matrix of both the petitions are similar in nature, this Court has deemed it appropriate to rely upon the pleadings stated in the W.P. (C) No. 5864/2021 for convenience of the stakeholders.

PLEADINGS BEFORE THIS COURT

6. The petitioner filed a brief synopsis summarizing the arguments regarding the maintainability of the petition. The same reads as under:

"The present petition has been filed by 19 administrative employees of the respondent institute which has a total sanctioned posts of 52 with 44 filled up out of which only 03 as permanent, the rest "on contract" for 28-14 years who are seeking regularisation which is being opposed on two grounds:
A. The respondent is not an instrumentality of the state.
B. Their initial appointments were temporary.
Whether the Respondent is an Instrumentality of the State:
(i)The respondent was conceived as an inter-services organisation under the Ministry of Defence as clearly reflected in the Annual reports of the respondent for the period 1968-69 and 69-70.
(ii) While notifying the establishment of Department of Military Affairs (DMA) under government of India (Allocation of Business) Three Hundred and Fifty Third Amendment Rules, 2019, vide Gazette notification dated 30.12.2019, it was ordered "After entry 20, following entry shall be inserted, namely:- "21. Institute for Defence Studies and Analysis, National Defence College and any other organization within the Ministry of Defence whose remit is broader than military matters."
(Annex-4 page 94 – 96).
(iii)Respondent is covered under the RTI Act, 2005.
(iv)The Respondent was originally named IDSA and has been rechristened as MPIDSA through a press note by the Ministry of Defence.
(v)Respondent is fully funded by the Ministry of Defence.
(vi)The Joint Secretary (Planning and International C-operation Division– PIC), Department of Defence under the Ministry of Defence is the Division in-charge in matters pertaining to the respondent.
(vii)The President of the respondent has to be the incumbent Defence Minster. The Defence Secretary and Foreign Secretary are the ex-officio members of the governing body of the society.
(viii)The Director General, Chief Executive officer of the respondent appointed exclusively by the Appointments Committee of Cabinet only.
(ix)The is headed by either serving or retired government officials.

(x)Campus of the Respondent, institutional and residential, has been built by DRDO on defence land inside Delhi Cantonment.
(xi)The service conditions of the employees are covered under the Central Civil Service (Classification, Control and Appeal), Rules.
(xii)Reservation Policies of the GOI are applicable to the Respondent.
(xiii)Employees are being paid on the the recommendations of the Central
Pay Commissions, presently the 7th Central Pay Commission.
(xiv)Deputation rules are applicable to the Respondent as applicable to Government employees.
(xv)Registered as government organization on GeM (Government e Market).
(xvi)GST Registration No. 07DELI00254C1D0 refers it as 'Statutory Body'.
(xvii)Covered under the National Informatics Centre (NIC) services, exclusively used by government agencies.
(xvii) For overseas visits of officers, clearance from the Ministry of Defence, Ministry of Home and Ministry of External Affairs are mandatorily required.
(xviii)Accounts are being audited by the CAG only.
(xix) Conducts detailed training programs for serving officers of The Indian Army, Indian Navy, the Indian Air Force including paramilitary forces like the Border Security Force and for the Indian Foreign Service officers also.
(xx) During covid pandemic, the Director General of the Respondent insisted on 100% attendance, claiming that it is part of the Ministry of Defence.
(xxi)Ministry of Defence exercises all pervasive control over the administrative affairs of the Institute. Lastly, the Ministry vide letters No. 6/62020-PO(Def) dated 13.08.2021 & 21.9.2021 communicated sweeping decisions regarding the detailed functioning of MPIDSA.
(xxii)In case of PIL Writ No. 11140/2021, which challenged the appointment of the Director General by the Cabinet Committee on Appointments (CCA), the Respondents did not raise the issue that they are not an instrumentality of the State as also in several

cases filed by past employees like in W P (C) No. 3780/2021 and W P (C) No. 1296/2014.

The judgments on the above issue as quoted by the Respondent is distinguishable and are not applicable in the present context to the extent that the appellant managements in the case of Tata Memorial Hospital and St. Mary's Educational Society are only private entities where it was held that they are not instrumentalities of state. In the case of Meenu Vs Integrated Health Society, the said judgment is not an authoritative pronouncement on the issue of state and it was held that the society was registered only 7 years back for undertaking project work, the same cannot be equated with a state.

II. Whether the Petitioners are entitled for Regularisation of their services.

The recruitment process in the Respondent is that the requirement of the post and it's pay scales are first approved by Executive Council/governing body of the respondent with concurrence from the Ministry of Defence and Ministry of Finance after which the posts are sanctioned by respondent, the posts are advertised and after tests and interviews an employee is selected.

Without a single exception, none is working on a non-sanctioned or non advertised posts and the Petitioners undertakes to produce copies of advertisements, if directed by this Hon'ble Court.

The recruitments are made by a selection committee appointed by Executive Council and in the cases of category -IV, the DG. Appointments of none of the petitioners could be termed as irregular even.

The service conditions of the employees are governed by the Manohar Parrikar Institute for Defence Studies & Analysis (Recruitment and promotion Rules), 1984. (Annexure -5 page 97-109). Rule -5 (iii) lays down that "The Sanctioning Authority in relation to any category of posts shall have the power ……"(iii) to determine whether any post created in that category shall be temporary." Like wise Rule 15 (2) reads:-"15 (ii) an employee who is employed in the institute against a regular vacancy shall be a regular employee of the institute." All

the petitioners have been appointed against posts which are sanctioned and all the petitioners fulfil all the eligibility requirements of their respective post.
The Respondents regularised a number of scholars and staff in 2010, under the above Rules, which could be followed in the case of the Petitioners also.
Thus as per rules of the respondent institute itself the services of the Petitioners are liable to be regularised. No Financial implication on the respondent in doing the above. The work undertaken by all the petitioners is of permanent nature and the respondent will need their assistance as long as the institute remains in operation. Not a single petitioner was appointment under any project work.
Several applications were filed due to the high handed actions and abuse of power targeted against the Petitioners, only because they approached this Hon'ble Court and during it's pendency the petitioners terms of "contract" were reduced from 3 years to 1 year etc, contrary to the Rules, falsified records, made adverse comments in APARs, issued baseless memos, made disparaging remarks in APAR & personal files, refused MACP etc".

7. In response to the above said contentions, the respondents also submitted a brief synopsis summarizing the contentions regarding non-maintainability of the present writs. The relevant extracts of the same reads as under:

B. THE RESPONDENT IS NOT A 'STATE' WITHIN THE MEANING OF ARTICLE 12 OF THE CONSTITUTION OF INDIA, 1950
6. At the outset, it is submitted that the present Writ Petition is not maintainable in as much as the answering Respondent is not an instrumentality of the State as defined in Article 12 of the Constitution of India, 1950. The Hon'ble Supreme Court in ***Pradeep Kumar Biswas vs Indian Institute of Chemical Biology & Ors., (2002) 5 SCC 111*** *[@ Para 40, Placitum b] was pleased to observe that question as to whether a society would fall within*

the meaning of Article 12 should be decided after examining whether the body is financially, functionally and administratively dominated by or under the control of the Government wherein control should be pervasive and not merely regulatory.

7. It is submitted that one of the primary grounds raised by the Petitioners to argue that the Respondent being a 'State' is the re-naming of the Respondent after the demise of the former Defence Minister Shri Manohar Parrikar. Further, the Petitioners have stated that inclusion of the Respondent in the Government of India (Allocation of Business) Rules, 1961 at Entry 21 under the Second Schedule recognizes the Respondent under Ministry of Defence.

8. The inherent fallacy in the submissions of the Petitioners is demonstrable from the fact the re-naming of the Respondent, was done after a prolonged and deliberate process of over 18 months which involved several steps like the majority approval of the resolution by the EC, then by the AGM on 15.07.2021 and thereafter, the second special meeting on 16.08.2021 during which, the Hon'ble Raksha Mantri categorically stated that renaming has no bearing on the autonomy of Society. [R-3 @ Pg. 65-66, at 86]

9. Further, inclusion of the Respondent in the Government of India (Allocation of Business) Rules, 1961 was only for the internal administrative convenience of the Ministry of Defence and it did not interfere in the autonomous functioning of the Respondent as a Society. This was also assured by the Defence Secretary on 08.05.2020, in the 165th meeting of the EC [R-2 @ Pg. 51]. Further, during the EGB meeting held on 16.08.2021, the Hon'ble Raksha Mantri assured the members that autonomy of MP-IDSA is and will be protected and honoured always [R-3 @ Pg. 82]. In this regard, the Hon'ble Supreme Court in ***Tata Memorial Hospital Workers Union vs. Tata Memorial Centre & Anr., (2010) 8 SCC 480*** *underscored that mere mentioning of a Trust under the Allocation of Business Rules would not in any manner decide the issue as to whether a particular industry is under the control of the Central Government [@ Para 77]. In the same vein, mere inclusion of MP-IDSA in the Allocation of Business Rules is not conclusive of it being a State.*

10. Notably, all recruitments, appointments and regulation of service conditions of employees of MP-IDSA, including the Petitioners, is an independent process without any interference from the Government. Reference can be made to the letter dated 27.02.2008 issued by the Ministry of Defence to the DG, MP-IDSA stating that the EC is the competent authority to determine the terms and conditions of the employees of MP-IDSA [R-4 @ Pg. 91].

11. In so far as the Gant-in-Aid is concerned, the functional and administrative control of the affairs of the Respondent, and in particular, the manner in which expenditure is to be incurred from the grant received vests entirely with the EC without any interference and/or control from the Government.

12. The Hon'ble Supreme Court ***Balmer Lawrie & Company Ltd. & Ors. vs. Partha Sarathi Sen Roy & Ors. (2013) 8 SCC 345*** *was pleased to observe that the term "control" in "pervasive control" is taken to mean check, restrain or influence [@ Para 24]. In the present case, as mentioned hereinabove, there is no check, restrain or influence by the Ministry of Defence and as such, does not have such deep and pervasive control over the affairs of the Respondent to be included as an instrumentality of the 'State' within the meaning of Article 12 of the Constitution of India, 1950.*

SUBMISSIONS
(On behalf of the respondent)

8. During the course of arguments before this Court, Mr. Rajshekhar Rao, the learned senior counsel for the respondent Institute raised the contentions regarding the non-maintainability of the instant petitions and advanced the following submissions.

9. The learned senior counsel submitted that the respondent Institute is not an instrumentality of State as defined in Article 12 of the Constitution of India, 1950, therefore, the instant writs are not maintainable *qua* the respondent Institute.

10. It is submitted that the autonomous bodies having some nexus with the Government by itself or the said entity funded by the Government would not bring them within the sweep of the expression of State.

11. It is submitted that the respondent Institute is a Society having its own rules and regulations, and was constituted with an objective of initiating study, discussions and research on problems of national security and impact of defence measures, therefore, essentially being a think tank dedicated to extensive research in the field of defence.

12. It is submitted that as per the bye-laws formulated by the members of the respondent Institute, it is governed by an Executive council ('EC' hereinafter) which is responsible for the management and administration of its day-to-day affairs.

13. It is submitted that the mere inclusion of the respondent Institute as an autonomous body of the Ministry of Defence would not lead to the conclusion that the said Ministry exercises its jurisdiction over the Institute, therefore, it fails to satisfy the 'deep and pervasive' test as enshrined by the Hon'ble Supreme Court in various judgments.

14. It is submitted that the independent character of the respondent Institute is also evident from the minutes of the 165th meeting of the EC, whereby, the Defence Secretary clarified that placement of the Institute under the Ministry, by way of allocation of the business rules, was only for the internal administrative purposes and the same does not interfere with its functioning.

15. It is submitted that the independence of the respondent Institute is evident from the fact that despite issuance of a press note dated 18th February, 2020 regarding renaming of the respondent Institute, the

renaming did not happen itself, rather the same was done as per the mandate of Section 12 of the Act where the said proposal required approval from the EC and the same was done in its 165th meeting held on 8th May, 2020.

16. The learned senior counsel further contended that the appointments and regulation of service conditions of the employees of the respondent Institute is an independent process and the same is done without any interference from the central government, and both the Ministry or the Government do not have any role in the said matters.

17. It is submitted that since the respondent Institute cannot be termed as an instrumentality of the State, the petitioners cannot seek parity between the employments of the Government *vis-a-vis* the respondent Institute.

18. It is also submitted that even though the respondent Institute receives an annual financial grant from the Ministry of Defence, the functional and administrative control of the affairs of respondent Institute vests with the EC and the same is without any interference/or control from the Government.

19. Therefore, in light of the foregoing submissions, the learned senior counsel for the respondent submitted that the instant petition, being non-maintainable, may be dismissed.

(***on behalf of the petitioners***)

20. Pursuant to conclusion of submissions with regard to maintainability of the writ by the learned senior counsel for the respondent, Mr. Sanjoy Ghosh, learned senior counsel appearing on

behalf of the petitioners rebutted the submissions advanced by the learned senior counsel for the respondent in the following manner.

21. The learned senior counsel submitted that the Ministry of Defence has deep and pervasive control over the functioning, administrative and financial affairs of the respondent Institute and the same can be proven by the fact that the respondent Institute was conceived as an inter-services organization under the Ministry.

22. It is submitted that the President of India issued a notification regarding inclusion of the respondent Institute under the extraordinary classification delineated in the Gazette of India dated 30th December, 2019 and therefore, the same shows that the respondent is an instrumentality of the State.

23. It is submitted that the notifications regarding appointments, promotions, leave, deputation of services etc. is published by the Ministry of Defence by way of official Gazettes.

24. It is submitted that the respondent Institute is also covered under the Right to Information Act, 2005 ('RTI Act' hereinafter) and therefore, is a State for the purposes of conferment of the writ jurisdiction.

25. It is also submitted that the renaming of the respondent Institute was done within 2 days after the issuance of the press note by the Government and the formalities including the EC approval were done only to meet the obligations under the Act.

26. It is submitted that the highest decision making body of the respondent Institute constitutes the incumbent Defence Minister, Defence Secretary and the Foreign Secretary as an *ex officio* member and the

Institute other High ranking officials from the Ministry as special invitee to the EC meetings.

27. It is submitted that the Director General ('DG' hereinafter) of the respondent Institute is exclusively appointed by the Appointments Committee of the Cabinet ('ACC' hereinafter) and all the officials appointed to the said position are either serving officers or the retired ones.

28. It is further submitted that the campus of the respondent Institute is situated on the land allotted by the Ministry of Defence inside the Delhi Cantonment and the Ministry of Defence charged a token rent of Re.1 for an initial term of 30 years, extendable for two more such periods.

29. It is also submitted that the respondent Institute is fully funded by the Government in the form of recurring grants and the funds earned by them is also deposited with the Government treasury on the directions of the Ministry of Defence.

30. The learned senior counsel further contended that the accounts of the respondent Institute are audited by the office of the Director of Audit, Defence services, Comptroller & Auditor General of India ('CAG' hereinafter).

31. It is submitted that the service conditions of the permanent and contractual employees of the respondent Institute are governed by the same terms and conditions as applicable to the other Government servants.

32. The learned senior counsel submitted that the Government's deep pervasive control over functioning of the respondent Institute is evident from the fact that the respondent functions directly under the orders of the

Joint Secretary, Ministry of Defence, and the EC has to seek prior approval from the Ministry of Defence for creation of additional posts in the respondent Institute.

33. Therefore, in light of the foregoing submissions, the learned senior counsel for the petitioners submitted that the present petition may be held to be maintainable and arguments be heard on merits.

ANALYSIS AND FINDINGS

34. Heard the learned senior counsel for the parties at length and perused the records relied upon by the counsel to substantiate their respective claims as well as the judicial pronouncements relied upon by them.

35. During the course of proceedings, the learned counsel for the respondent Institute made a preliminary objection with respect to the maintainability of the present writ. Therefore, in this judgment, this Court is adjudicating the issue of maintainability only.

36. The summary of the contentions raised by the learned senior counsel for the respondent Institute is that the respondent is merely a society registered under the Act and is governed by the rules and regulations formulated and approved by its members and despite funding given by the Government, it does not have pervasive control, a condition necessary to establish the respondent Institute as an instrumentality of State. The learned senior counsel also contended that mere regulatory control over the functioning of the respondent Institute does not make the respondent fall within the ambit of Article 12 of the Constitution of India,

rather the conditions charted out by the Hon'ble Supreme Court needs to be met in order to hold the Institute a "State".

37. In rival submissions, the learned senior counsel for the petitioners rebutted the said arguments by stating that the functioning of the respondent Institute involves deep and pervasive control of the Government and therefore, the Institute situated on a land provided by the Government is a State within the contours of Article 12 of the Constitution of India. In support of the said contention, the learned senior counsel has referred to the control of the Government over the disbursement of funds, appointment of employees and involvement of the Ministry's officials in the highest decision making body. Lastly, the learned senior counsel contended that the respondent Institute is also within the ambit of RTI and the accounts are audited by the official auditor wing of the Government, i.e. the CAG and therefore, the instant petition against the Institute is maintainable under Article 226 of the Constitution of India.

38. Therefore, the limited question for determination before this Court is whether the respondent Institute meets the tests enunciated and expounded by the Hon'ble Supreme Court for the purpose of declaring an entity as State under the ambit of Article 12 of the Constitution of India.

39. In order to answer the said question, this Court deems it appropriate to first deal with the aspect of inclusion of an entity as a State and the factors crystalized by the Constitutional Courts to determine the same.

40. Article 12 of the Constitution of India provides for definition of the term State and the same 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."*

41. Upon perusal of the above, it is clear that the term State constitutes the following authorities:

(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.

42. The understanding and interpretation of the first two terms is self-explanatory and for understanding the meaning of the term *local authority,* a reference to the General Clauses Act, 1897 can be done.

43. Now, the only aspect which needs deliberation and has evolved over a period of time is the interpretation of the term *other authority.* The question with regard to interpretation of the term *other authority* came up before the Hon'ble Supreme Court and this Court time and again, whereby, the landmark judgments delivered by the Hon'ble Supreme Court settled the position regarding inclusion of the entities under the term *other authority*.

44. In ***Ajay Hasia v. Khalid Mujib Sehravardi***[1] the Hon'ble Supreme Court dealt with the issue of inclusion of various authorities within the ambit of Article 12 of the Constitution of India and held as under:

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[1] **(1981) 1 SCC 722**

*"**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."*

45. 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 provided for in Article 12 of the Constitution of India.

46. The foregoing paragraphs also clarify that an entity can be construed as an authority if the Government of India has majority financial control which establishes the interference 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.

47. The above cited excerpt various criteria to ascertain whether an entity can be termed as an instrumentality of a State. The relevant criteria are as follows:

- Ownership of entire share capital by the Government.
- Extensive financial assistance from the state.
- Monopoly status conferred or protected by the state.
- Deep and pervasive control by the state.
- Performance of functions closely related to governmental functions.
- Transfer of a government department to the corporation.

48. Therefore, the question for determination before this Court is whether the respondent Institute falls within the above said criteria or not.

49. Before addressing the said question, this Court deems it important to discuss another landmark judgment rendered by the Hon'ble Supreme Court in the case of ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,***[2] whereby, the Hon'ble Court laid down the conditions for terming an entity as a State under Article 12 of the Constitution of India. The relevant parts of the said case read as under:

> *"**What is "authority" and when includible in "other authorities", re : Article 12***

[2] **(2002) 5 SCC 111**

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.

CSIR if "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 Tekraj Vasandi 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*."

50. In the above cited extracts, it is clear that the Hon'ble Court deliberated upon the earlier settled position of law and thereby, held that an entity is required to be tested on three parameters namely financial, functional and administration for its inclusion as *other authority* in Article 12 of the Constitution of India.

51. The above cited cases help the Constitutional Courts to determine the identity of an entity and their inclusion within the contours of the term *other authority* as provided under Article 12.

52. Therefore, this Court needs to apply the aforesaid principles and test whether the Government of India *through* its Ministry of Defence has control over financial, functional and administration of the respondent Institute or not.

53. Adverting to the aspect of Financial Control first, it is not in dispute that the respondent Institute is fully funded by the Central Government, therefore, this Court does not need to determine the same, rather the only aspect for determination in this aspect is whether the Government enjoys any control even after the disbursement of funds or not.

54. As per material on record, the employees of the respondent Institute are being paid on the basis of the recommendations made by the 7th Pay Commission *vide* MoD, PIC/PO (Def) letter dated 6th April, 2016 and were also duly paid the salaries as per the latest recommendations of the pay commission adopted by the Government.

55. The Gazette dated 30th December, 2019 puts the respondent Institute in the Government of India (Allocation of Business Rules 1961) under Ministry of Defence, therefore, treating the same at par with any other government entity as the same is only applicable to the instrumentalities of the State.

56. The disbursement of the funds, i.e., decision regarding pay & allowances, appointment of Finance Officer and allocation of corpus funds etc. is also taken in compliance with the directions issued by the Ministry of Finance and Ministry of Defence *vide* letter No. 6/62020-PO(Def) dated 13th August, 2021 & 21st September, 2021 whereby, the Institute was directed to comply with the guidelines issued by the Ministry of Finance.

57. Furthermore, pursuant to directions from the Ministry, the amount earned from its operation by the respondent Institute gets deposited with

the consolidated funds of India, therefore, hinting towards direct say of the Government over management of funds.

58. In light of the same, this Court is of the view that the Ministry of Defence enjoys full control over the finances of the respondent Institute. The said conclusion is not drawn only from the fact that the respondent Institute is fully funded by the Government, rather the continuous say over utilization of the funds makes it evident that the Government has control over the finances.

59. Furthermore, the auditing of the funds of the respondent Institute by the CAG makes it clear that the respondent is considered as part of the Government itself.

60. Now coming to the other aspect, i.e. the Administrative control over the respondent Institute.

61. In support of their claim regarding deep and pervasive control over the administration, the learned senior counsel for the petitioners submitted that the high ranking officials of the Ministry of Defence are members of the EC and therefore, taking decisions for the Institute. Apart from that, the learned senior counsel has argued that the DG of the Institute is appointed by the ACC, therefore, establishing a direct nexus between the Government and the Institute.

62. In response to the said contention, the learned senior counsel for the respondent submitted that the decision making power vests with the EC and the control of the Ministry through its Secretary is mere regulatory in nature.

63. As per material on record, the EC of the respondent Institute is the highest decision making body. The powers and responsibilities of the EC are explained in the Memorandum of Association in following manner:

> *"10. Executive Council: Composition of the Executive Council: As hereinafter provided, the Executive Council of the Institute shall be composed of:*
> *(i) The President of the Institute*
> *(ii) Not less than 8 and not more than 10 members of the Institute elected by the members*
> *(iii) Director General of the Institute (Ex- officio)*
> *(iv) The Deputy Director General (Ex-officio)5 and the academic staff member6 . The latter will be co-opted for one year at a time in order of seniority from among the regular academic staff member. The scholars under the Fellowship Award (T&C) Rules – 2011 should also have the opportunity to be co-opted as Staff Representative to the EC.*
>
> *11.The members of the Executive Council shall remain in office for a period of two years and till the new Executive Council is constituted.*
> *12. (i) The Council shall have powers at any time to appoint any qualified person to be a member of the Council either to fill a casual vacancy or as an additional member of the Council provide that the total number of members of the Council shall not at any time exceed the maximum number i.e. 12.*
> *(ii) Any person so appointed by the Executive Council in a casual vacancy or as an additional member of the Council shall hold office till the new Council is constituted. The term of an EC member cannot be more than 2 consecutive tenures of two years.*
> *(iii) Temporary vacancies arising as a result of a member informing the Council of his intention to be absent from Delhi for more than one month, may be filled by the Council at their discretion for the period of such absence.*

13. (a) Powers and Functions of the Executive Council Subject to the general control and directions of the General Body, the Executive Council shall be responsible for the management and the administration of the affairs of the Institute in accordance with the these rules and the bye-laws made thereunder for the furtherance of its objects and shall have all powers which may be necessary or expedient for the purpose.
(b) Without prejudice to the generality of the powers conferred by the following Sub-Rules, the Executive Council shall have the powers:

(i) To look after, supervise the management of the Institution and to expand money required for the purpose
(ii) To prepare and submit to the Annual General Meeting the Balance Sheet, the Audited Accounts and the Annual Report of the previous year.
(iii) To pay all rates, rents, taxes, salaries and remuneration of the employees of the Institute.
(iv) To take decisions on application for membership
(v) To prepare and execute detailed plans and programmes for the furtherance of the objects of the Institute.
(vi) To receive, to have custody of and to expand the funds of the Institute and to manage the properties of the Institute.
(vii) To appoint and control such staff as any be required for efficient management of the affairs of the Institute and to regulate their recruitment and conditions of service.
(viii)To negotiate and enter into contracts for and on behalf of the Institute, and to vary and resume such contracts.
(ix) To sue, prosecute and defend all legal proceedings on behalf of the Institute. (x) To appoint, from time to time, any Committee or SubCommittee as

may be thought fit and to delegate any of the powers to them for disposal of any business of the Institute or for advice in the matter pertaining to the Institute.

(xi) To consider any specific matter, the Executive council shall have the power to nominate not more than two experts at a time to itself and to the various Committees that may be set up.

(xii) To make, adopt and vary from time to time, bye-laws for the regulation of and for any purposes connected with the management and administration of the affairs of this Institute and for furtherance of its objects, in particular to make, adopt and vary, from time to time, bye-laws of conducting the business of the Executive Council.

(c) A resolution of the Executive Council may also be passed by circulating the draft in writing among the members of the Executive Council and if a majority of the members of Executive Council approve of it, then, such a resolution shall be valid and effective as if it had been passed at a meeting of the Executive Council duly convened and held."

64. Upon perusal of the above said, it is made out that the EC is entrusted with most of the decision making power of the respondent Institute and the maximum number of members in the EC shall not be more than 12.

65. During the course of proceedings, in reply to a specific Court query put forth, the learned senior counsel appearing on behalf of the respondent submitted that the Defence Minister of the country heads the EC and the Secretaries of the Ministry of Defence and Foreign affairs are its members.

66. The information available in public domain also depicts that the majority of the members and invitees are part of the Ministry, therefore, exerting complete control over the decision making of the Institute.

67. As per the said answer by the learned senior counsel and the material available in the public domain, this Court is satisfied that most of the members of the EC are from the Government i.e. the Ministry of Defence and are part of the EC by virtue of them holding a significant position in the Ministry of Defence.

68. Therefore, the presence of a majority of the members in the EC from the Government makes the control of the Government evident in the administration of the respondent Institute.

69. Now coming to another contention raised by the learned senior counsel for the petitioners, i.e., the appointment of Director General has been entrusted to the ACC, therefore, proving direct control over the administration of the Institute.

70. The ACC is one of the high power committees of the Government entrusted to recommend names for the officials to head important Government Organizations, therefore, the appointment of the DG for respondent Institute by the said committee cannot be termed as a mere convention, rather the same should be construed as an important administrative function vested with the Government.

71. The material on record also suggests that the Additional Secretary of the Ministry of Defence is empowered to serve as the officiating DG during the absence of a permanent one, therefore, strengthening the contention of the petitioners in this regard.

72. Furthermore, the decisions regarding appointments, promotion and deputation of the services of the Government officials in the respondent Institute also happen through the official Gazettes of the Ministry of Defence, therefore, this Court is of the view that the Government has deep and pervasive control over the administration as well.

73. Having satisfied with the two aspects regarding the control of the Government, this Court deems it appropriate to deal with the third aspect, i.e., presence of functional control of the Government over the respondent Institute.

74. As per the records produced by the petitioners, the functioning of the respondent comes directly under the orders of the Joint Secretary of the Ministry of Defence. Even though the said control has been termed regulatory in nature by the learned senior counsel for the respondent, the learned senior counsel for the petitioners has rebutted the same. Therefore, this Court needs to determine whether the other functions as undertaken by the officials of the Ministry would amount to total control over functioning of the respondent Institute or not.

75. As per the material on record, in the past, the Ministry of Defence has issued various letters directing the respondent Institute to comply with the guidelines of the Ministry of Finance. Furthermore, for creation of additional posts in the Institute, the EC of the respondent had to seek prior permission from the Ministry.

76. Apart from the said structure, the deep and pervasive control of the respondent Ministry is also evident from the fact that the researchers and the other employees of the respondent Institute were sent on deputation to various similar government organizations and *vice versa*.

77. Even though the learned senior counsel has contended that the salaries of such deputed employees were still paid by the parent department, having such mechanism within various other government departments is sufficient enough to prove that the Ministry enjoyed a say in functioning of the Institute.

78. During the course of proceedings, the learned senior counsel for the respondent Institute has referred to the minutes of the 165th meeting held on 8th May, 2020, where, the Chair of the meeting assured the continuance of the autonomy of the institution, therefore, leading to the respondent claiming to be non-State and not within the ambit of Article 12 of the Constitution.

79. In this regard, this Court is of the view that mere separate functioning from the Ministry does not mean that the Institution in itself is independent of the control of the Government, rather the same can only be tested on the basis of actual control exerted by the Government.

80. The material available on record clearly suggests that the respondent Institute is conforming to all the regulations mandated by the Ministry. Furthermore, the renaming of the institution was done immediately after the issuance of the press note by the Government. In this regard, even though the respondent Institute has argued that the said procedure has legally taken 18 months, however, this Court agrees with the contention of the petitioners in this regard, where the following of procedure is merely due to the statutory obligation and the name of the Institute was changed immediately after the release of the press note.

81. At last, this Court also finds it necessary to deal with the case heavily relied upon by the learned senior counsel for the respondent

Institute to supplement his arguments regarding non-inclusion of the respondent Institute as a State under Article 12.

82. The learned senior counsel has relied upon the case titled ***T.M. Sampath v. Ministry of Water Resources,***[3] whereby, the Hon'ble Supreme Court dealt with the question of inclusion of National Water Development Agency ('NWDA' hereinafter) as a State. The relevant parts of the said judgment are reproduced herein:

> *"**16.** On the issue of parity between the employees of NWDA and Central Government employees, even if it is assumed that the 1982 Rules did not exist or were not applicable on the date of the OM i.e. 1-5-1987, the relevant date of parity, the principle of parity cannot be applicable to the employees of NWDA. NWDA cannot be treated as an instrumentality of the State under Article 12 of the Constitution merely on the basis that its funds are granted by the Central Government. In Zee Telefilms Ltd. v. Union of India [(2005) 4 SCC 649] , it was held by this Court that the autonomous bodies having some nexus with the Government by itself would not bring them within the sweep of the expression "State" and each case must be determined on its own merits. Thus, the plea of the employees of NWDA to be treated on a par with their counterparts in the Central Government under sub-rule (6)(iv) of Rule 209 of the General Financial Rules, merely on the basis of funding is not applicable.*
>
> ***17.** Even if it is presumed that NWDA is "State" under Article 12 of the Constitution, the appellants have failed to prove that they are on a par with their counterparts, with whom they claim parity. As held by this Court in UT, Chandigarh v. Krishan Bhandari*

[3] **(2015) 5 SCC 333**

> *[(1996) 11 SCC 348 : 1997 SCC (L&S) 391] , the claim to equality can be claimed when there is discrimination by the State between two persons who are similarly situated. The said discrimination cannot be invoked in cases where discrimination sought to be shown is between acts of two different authorities functioning as State under Article 12. Thus, the employees of NWDA cannot be said to be "Central Government employees" as stated in the OM for its applicability."*

83. Upon perusal of the above cited extract, it is made out that the Hon'ble Supreme Court held the NWDA not to be a State because the Hon'ble Court observed only some nexus with the Government, where the control was limited to funding of the said entity.

84. The above cited paragraph makes it amply clear that the Hon'ble Supreme Court also opined that the inclusion of an entity as a State needs to be done on the merits of the case and a blanket ruling in one particular case cannot be relied upon in all the cases.

85. In the present case, the role of the Government is not only limited to the extent of funding, rather the same is extended to the control over the other regimes such as decision making, day to day functions, appointments/recruitments etc.

86. Therefore, the case cited by the respondent Institute is of no relevance here as the factual matrix of the instant case is different from the case adjudicated by the Hon'ble Supreme Court.

87. In light of the foregoing discussions, this Court is of the view that the test laid down by the Hon'ble Supreme Court with regard to inclusion of an entity as a State is duly met in the case of the respondent Institute,

where it is apparent that the Ministry of Defence, i.e. the Government has control over functioning, finance and administration of the respondent Institute which makes the same an instrumentality of State under Article 12 and thus, amenable to the writ jurisdiction of this Court.

CONCLUSION

88. The question of inclusion of entities as *other authorities* has been answered by the Constitutional Courts of this Country where the said term has been subject to interpretation on various aspects.

89. Pursuant to the landmark judgment of the Hon'ble Supreme Court in the case of ***Pradeep Kumar Biswas* (*supra*)** it is clear that an entity needs to be financially, functionally and administrative under the control of the Government and then only can be termed as a State.

90. In the instant case, the overarching control of the Ministry of Defence over finances, recruitment, functioning etc. in the respondent Institute makes it evident that the Ministry has deep and pervasive control in the Institute. The presence of majority of the members in the EC from the Government is testament to the fact that the decisions taken by the EC are not independent of the Government control. Furthermore, it is also an undisputed fact that the respondent Institute undertakes research only for the Government and not any other private agencies.

91. Therefore, this Court is of the view that the respondent Institute is an instrumentality of State and can be subjected to the writ jurisdiction of this Court.

92. In light of the same, it is held that the present writs filed by the petitioners are maintainable and this Court is well within its powers to adjudicate the same on merits.

93. It is made clear that the instant judgment is restricted to the maintainability of the writs and this Court shall hear the arguments on merits on the next date of hearing i.e. 3rd September, 2024.

94. During the pendency of the proceedings, this Court *vide* order dated 4th June, 2021 had directed interim stay on the termination of the services of the petitioners, therefore, the same shall continue.

95. The respondent is directed to file the counter affidavit within 4 weeks and rejoinder thereto (if any) within 2 weeks thereafter. The parties are also directed to file the written synopsis not exceeding 5 pages.

96. The judgment be uploaded on the website forthwith.

(CHANDRA DHARI SINGH)
JUDGE

APRIL 16th, 2024
gs/av/ryp