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PRADEEP KUMAR BISWAS AND ORS.

v.

INDIAN INSTITUTE OF CHEMICAL BIOLOGY AND ORS.

APRIL 16, 2002

B

[S.P. BHARUCHA, CJ., SYED SHAH MOHAMMED QUADRI, R.C. LAHOTI, N. SANTOSH HEGDE, DORAISWAMY RAJU, RUMA PAL AND ARIJIT PASAYAT, JJ.]

C

Constitution of India, 1950—Article 12—Council of Scientific and Industrial Research (CSIR)—Whether a ‘State’—Held, it is ‘State’ falling within the range of the Article as per the tests judicially evolved for the purpose—Notification bringing CSIR within purview of Section 14(2) of Administrative Tribunals Act, 1985 is conclusive of the fact that CSIR is a state within the meaning of Article 12.

D

Precedent—Normally a precedent which has stood for a length of time should not be reversed however erroneous the reasoning is, if it has stood unquestioned—But in the facts of the case, Sabhajit Tewary’ case cannot stand as an authority since the decision was plainly erroneous—It is Court’s duty not to perpetuate its mistake.

E

Appellants-employees of a Unit of Council of Scientific and Industrial Research (CSIR) had filed Writ Petition challenging their termination from service. High Court dismissed the same in view of Sabhajit Tewary’s case wherein it was held that writ petition against CSIR was not maintainable as it was not an authority within the meaning of Article 12 of the Constitution of India.

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In appeal to this Court, the matter was referred to the Constitution Bench for reconsideration of Sabhajit Tewary’s case having regard to the pronouncement of this Court in several subsequent decisions in respect of several other institutes of similar nature set up by Union of India.

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Thus the question for consideration was whether CSIR is a State within the meaning of Article 12 of the Constitution.

Answering the question, the Court

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HELD: *Per Ruma Pal, J. (For herself, CJI, Quadri, Hedge and Pasayat, JJ.)* A

1.1. In view of the facts relating the CSIR, it is well within the range of Article 12, a conclusion which is sustainable when judged according to the tests judicially evolved for the purpose. The tests formulated in *Ajay Hasia's* case are not a rigid set of principles so that if a body falls within any one of them it must, *ex hypothesi*, be considered to be a State within the meaning of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State. [119-A, 118-F, G, H] B C

Sabhajit Tewary v. Union of India, [1975] 3 SCR 616, overruled.

Rajasthan Electricity Board v. Mohan Lal and Ors., [1967] 3 SCR 377; *Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Ors.*, [1975] 3 SCR 619; *Ramana v. International Airport Authority of India*, (1979) SC 1628; *Ajay Hasia v. Khalid Mujib Sebravardi*, [1981] 1 SCC 722; *Som Prakash Rekhi v. Union of India*, AIR (1981) SC 212; *P.K. Ramachandra Iyer and Ors. v. Union of India and Ors.*, [1984] 2 SCC 141; *B.S. Minhas v. Indian Statistical Institute and Ors.*, [1984] 1 SCR 395; *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguli*, AIR (1986) SC 1571; *All India Sainik Schools Employees' Association v. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi and Ors.*, [1989] Supp. 1 SCC 205 and *Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association*, JT (2000) 1 SC 61, relied on. D E F

Tekraj Vasandi alias K.S. Basandhi v. Union of India and Ors., [1988] 1 SCC 237; *Chander Mohan Khanna v. National Council of Educational research and Training and Ors.*, [1991] 4 SCC 578; *E.P. Royappa v. State of Tamil Nadu*, [1974] 2 SCR 348; *Maneka Gandhi v. Union of India*, [1978] 1 SCC 248 and *Praga Tools Corporation v. Shri C.A. Imanuel and Ors.*, [1969] 3 SCR 773, referred to. G

1.2. Normally, a precedent which has stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being distinguished' out of all recognition by subsequent H

A decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, some equally authoritative. *Sabhajit Tewary's* case cannot still stand as an authority even on the facts merely because it has stood for 25 years. Parallels may be drawn even on the facts leading to an untenable interpretation of Article 12 and a consequential denial of the benefits of fundamental rights to individuals

B who would otherwise be entitled to them. Since on a re-examination of the question, it is concluded that the decisions was plainly erroneous, it is the Court's duty to say so and not perpetuate its mistake. [112-D-E; 126-B-D]

C *Bengal Immunity Co Ltd. v. State of Bihar and Ors.*, AIR (1955) SC 661, relied on.

D 1.3. That 'inclusive' definition is generally not exhaustive, is a statement of the obvious and is so as far as Article 12 of the Constitution is concerned. The words 'State' and 'Authority' used in Article 12, therefore, remain, among "the great generalities of the Constitution", the contents of which have been and continue to be supplied by Courts from time to time. [107-C]

Smt. Ujjain Bai v. State of Uttar Pradesh, [1963] 1 SCR 778, referred to.

'*The Nature of the Judicial Process*' by Benjamin Cardozo, referred to.

E 2. The Notification bringing CSIR within perview of S.14(2) of Administrative Tribunals Act, 1985 was conclusive of the fact that CSIR was a State within the meaning of Article 12. Reading Article 323 A of the Constitution and Section 14 of the 1985 Act, it is clear that no notification under S.14(2) of the Administrative Tribunals Act could have been issued by the

F Central Government unless the employees of the CSIR were either appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Once such a notification has been issued in respect of CSIR, the consequence will be that an application would lie at the

G instance of the appellants at least before the Administrative Tribunals. No new jurisdiction was created in the Administrative Tribunal. The notification which was issued by the Central Government merely served to shift the service disputes of the employees of CSIR from the constitutional jurisdiction of the High Court under Article 226 to the Administrative Tribunals on the factual basis that CSIR was amenable to the writ jurisdiction as a State or other

H authority under Article 12 of the Constitution. [126-F, G; 127-A, B, C]

S.R.S. Kumar v. Union of India, AIR (1987) SC 386 and *L. Chandra Kumar v. Union of India*, [1997] 3 SCC 261, referred to. A

Per Lahoti, J. (For himself and Raju, J.)—(Dissenting):

1.1. Council for Scientific and Industrial Research (CSIR) is not a State within the meaning of Article 12 of the Constitution. It is not an 'authority' so as to fall within the meaning of expression 'other authorities' under Article 12. It has no statutory flavour—neither it owes its birth to a statute nor is there any other statute conferring it with such powers as would enable it being branded an authority. The indicia of power is absent. It does not discharge such functions as are governmental or closely associated therewith or being fundamental to the life of the people. [148-C; 145-E] B C

1.2. Though the fundamental and basic principles for determining whether a particular body is 'the State' or not, substantially remain the same but the emphasis on their applicability to the facts found is differed from. A distinction has to be borne in mind between an instrumentality or agency of 'the State' and an authority includible in 'other authorities'. The distinction cannot be obliterated. [127-G, H; 128-A] D

1.3. 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*. [144-A] E

1.4. Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13(2) governing its relationship with other people or the affairs of other people—their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for one who enjoys the powers or privileges of the State F G H

A must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power-constitutionally 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. [144-B-F]

B

C 1.5. In view of the meaning which 'authority' carries, the question whether an entity is an 'authority' cannot be answered by applying *Ajay Hasia* tests. The tests laid down in *Ajay Hasia's* case are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in positive nor a positive answer to *one or two tests* would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil

D disguising the entity concerned. When an entity has an independent legal existence, before it is held to be State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State. [145-A-D]

E 1.6. Framers of the Constitution used the word "the State" in a wider sense than what is understood in the ordinary or narrower sense. So far as 'other authorities' are concerned they were included subject to their satisfying the test of being 'within the territory of India' or being 'under the control of the Government of India'. The expression 'under the control of the

F Government of India' in Article 12 does not qualify the word 'territory', it qualifies 'other authorities'. [129-C, D]

G 1.7. Expanding dimension of 'the State' doctrine through judicial wisdom ought to be accompanied by wise limitations else the expansion may go much beyond what even the framers of Article 12 may have thought of. [129-E, F]

H 1.8. The definition of the State as contained in Article 12 is inclusive and not conclusive. The net of Article 12 has been expanded by 'progressive' judicial thinking, so as to include within its ken several instrumentalities and agencies performing State functions or entrusted with State action. The width of expansion and the wisdom of limitations both have to be spelled out from

Article 12 itself and the fundamentals of constitutional jurisprudence. A

[130-G, H; 131-A]

1.9. 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 entrust it with the same power, function or action which would otherwise have been exercised or undertaken by itself there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. Any company, corporation, society or any other entity having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a double or a proxy or a limb or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on-by whatever name called-of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an instrumentality or agency of the State. [143-E-G] B C D

Sabhajit Tiwary v. Union of India, [1975] 3 SCR 616, affirmed.

Tekraj Vasandi @ K.L. Basandhi v. Union of India and Ors., [1988] 1 SCC 236 and *Chander Mohan Khanna v. NCERT*, [1991] 4 SCC 578, relied on. E

N. Masthan Sahib v. The Chief Commissioner, Pondicherry and Anr., [1962] Supp. 1 SCR 981; *K.S. Ramamurthy Reddiar v. Chief Commissioner, Pondicherry and Anr.*, [1964] 1 SCR 656; *Rajasthan State Electricity Board Jaipur v. Mohan Lal and Ors.*, [1967] 3 SCR 377; *Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Anr.*, [1975] 1 SCC 421, *Ramana Dayaram Shetty v. The International Airport Authority of India and Ors.*, [1979] 3 SCC 489; *Ajay Hasia etc. v. Khalid Mujib Sehravardi and Ors. etc.*, [1981] 1 SCC 722; *Som Prakash Rekhi v. Union of India and Anr.*, [1981] 1 SCC 449; *Smt. Ujjam Bai v. State of Uttar Pradesh and Anr.*, [1963] 1 SCR 778; *Praga Tools Corporation v. V. Imanuel and Ors.*, [1969] 1 SCC 585; *The Workmen, Food Corporation of India v. Food Corporation of India*, [1985] 2 SCC 136 and *Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association and Anr.* JT (2002) 1 SC 61, referred to. F G

Black's Law Dictionary (Seventh Edition); *Webster Comprehensive Dictionary (International Edition)*; *Webster's Third New International Dictionary*, referred to. H

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 992 of 2002.

From the Judgment and Order dated 12.2.86 of the Kolkata High Court in F.M.A.T. No. 314 of 1986.

B Soli J. Sorabjee, Attorney General, Mukul Rohtagi, R.N. Trivedi, Additional Solicitor General, Sanjoy Kumar Ghosh, Deba Prasad Mukherjee, B.D. Sharma, Narottam Vyas, S.N. Tiwari, Ms. Deepshikha Bharti, Mrs. Madhu Sikri, V.K. Rao, Ms. Piyush Sharma, Ravi Sikri, Ajay Verma, Ms. Anuradha Priyadarshni, Prateek Jalan, Manish Singhvi and S.N. Terdol for the appearing parties.

C The Judgment of the Court were delivered by

D **RUMA PAL, J.** In 1972 Sabhajit Tewary, a Junior Stenographer with the Council of Scientific and Industrial Research (CSIR) filed a writ petition under Article 32 of the Constitution claiming parity of remuneration with the stenographers who were newly recruited to the CSIR. His claim was based on Article 14 of the Constitution. A Bench of five judges of this Court denied him the benefit of that Article because they held in *Sabhajit Tewary v. Union of India* that the writ application was not maintainable against CSIR as it was not an "authority" within the meaning of Article 12 of the Constitution. The correctness of the decision is before us for re-consideration. The immediate cause for such re-consideration is a writ application filed by the appellants in the Calcutta High Court challenging the termination of their services by the respondent No. 1 which is a unit of CSIR. They prayed for an interim order before the learned Single Judge. That was refused by the Court on the prima view that the writ application was itself not maintainable against the respondent No. 1. The appeal was also dismissed in view of the decision of this Court in *Sabhajit Tewary's* case.

G Challenging the order of the Calcutta High Court, the appellants filed an appeal by way of special leave before this Court. On 5th August, 1986 a Bench of two Judges of this Court referred the matter to a Constitution Bench being of the view that the decision in *Sabhajit Tewary* required re-consideration "having regard to the pronouncement of this Court in several subsequent decisions in respect of several other institutes of similar nature set up by the Union of India". The questions therefore before us are - is the CSIR a State within the meaning of Article 12 of the Constitution and if it is should this

H 1. [1975] 3 SCR 616.
2. (Supra)

Court reverse a decision which has stood for over a quarter of a century? A

The Constitution has to an extent defined the word 'State' in Article 12 itself as including:

"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". B

That an 'inclusive' definition is generally not exhaustive is a statement of the obvious and as far as Article 12 is concerned, has been so held by this Court.³ The words 'State' and 'Authority' used in Article 12 therefore remain, to use the words of Cardozo⁴, among "the great generalities of the Constitution" the content of which has been and continues to be supplied by Courts from time to time. C

It would be a practical impossibility and an unnecessary exercise to note each of the multitude of decisions on the point. It is enough for our present purposes to merely note that the decisions may be categorized broadly into those which express a narrow and those that express a more liberal view and to consider some decisions of this Court as illustrative of this apparent divergence. In the ultimate analysis the difference may perhaps be attributable to different stages in the history of the development of the law by judicial decisions on the subject. D E

But before considering the decisions it must be emphasized that the significance of Article 12 lies in the fact that it occurs in Part III of the Constitution which deals with fundamental rights. The various Articles in Part-III have placed responsibilities and obligations on the 'State' *viz-a-vis* the individual to ensure constitutional protection of the individual's rights against the State, including the right to equality under Article 14 and equality of opportunity in matters of public employment under Article 16 and most importantly the right to enforce all or any of these fundamental rights against the 'State' as defined in Article 12 either under Article 32 by this Court or under Article 226 by the High Courts by issuance of writs or directions or orders. F G

The range and scope of Article 14 and consequently Article 16 have

3. *Smt. Ujjam Bai v. State of Uttar Pradesh*, [1963] 1 SCR 778 at 968.

4. Benjamin Cardozo : *The Nature of the Judicial Process*. H

A been widened by a process of judicial interpretation so that the right to equality now not only means the right not to be discriminated against but also protection against any arbitrary or irrational act of the State. It has been said that:

B “Articles 14 and 16 strike at arbitrariness in State action and ensure fairness and equality of treatment”.⁵

C Keeping pace with this broad approach to the concept of equality under Articles 14 and 16, Courts have whenever possible, sought to curb an arbitrary exercise of power against individuals by ‘centres of power’, and there was correspondingly an expansion in the judicial definition of ‘State’ in Article 12.

D Initially the definition of State was treated as exhaustive and confined to the authorities or those which could be read *ejusdem generis* with the authorities mentioned in the definition of Article 12 itself. The next stage was reached when the definition of ‘State’ came to be understood with reference to the remedies available against it. For example, historically, a writ of mandamus was available for enforcement of statutory duties or duties of a public nature.⁶ Thus a statutory corporation, with regulations framed by such Corporation pursuant to statutory powers was considered a State, and the public duty was limited to those which were created by statute.

E The decision of the Constitution Bench of this Court in *Rajasthan Electricity Board v. Mohan Lal and Ors.*, [1967] 3 SCR 377 is illustrative of this. The question there was whether the Electricity Board - which was a Corporation constituted under a statute primarily for the purpose of carrying on commercial activities could come within the definition of ‘State’ in Article F 12. After considering earlier decisions, it was said:

G “These decisions of the Court support our view that the expression “other authorities” in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities”.

It followed that since a Company incorporated under the Companies

5. *E.P. Royappa v. State of Tamil Nadu*, [1974] 2 SCR 348; [1974] 4 SCC 3; [1974] SCC (L & S) 165; (See also *Maneka Gandhi v. Union of India*, [1978] 1 SCC 248;

H 6. *See Praga Tools Corporation v. Imanul*, [1969] 3 SCR 773,

Act is not formed statutorily and is not subject to any statutory duty vis a vis A
 an individual, it was excluded from the purview of 'State' *In Praga Tools*
*Corporation V. Shri C.A. Imanuel and Ors.*⁷ where the question was whether
 an application under Article 226 for issuance of a writ of mandamus would
 lie impugning an agreement arrived at between a Company and its workmen,
 the Court held that:

“there was neither a statutory nor a public duty imposed on it by a B
 statute in respect of which enforcement could be sought by means of
 a *mandamus*, nor was there in its workmen any corresponding legal
 right for enforcement of any such statutory or public duty. The High
 Court, therefore, was right in holding that no writ petition for a C
mandamus or an order in the nature of *mandamus* could lie against
 the company”.

By 1975 Mathew, J. in *Sukhdev Singh and Ors. v. Bhagatram Sardar*
*Singh Raghuvanshi and Ors.*⁸ noted that the concept of “State” in Article 12
 had undergone “drastic changes in recent years”. The question in that case D
 was whether the Oil and Natural Gas Commission, the Industrial Finance
 Corporation and the Life Insurance Corporation each of which were public
 corporations set up by statutes were authorities and therefore within the
 definition of State in Article 12. The Court affirmed the decision in *Rajasthan*
State Electricity Board v. Mohan Lal (supra) and held that the Court could E
 compel compliance of statutory rules. But the majority view expressed by
 A.N. Ray, CJ also indicated that the concept would include a public authority
 which:

“is a body which has public or statutory duties to perform and which
 performs those duties and carries out its transactions for the benefit
 of the public and not for private profit. Such an authority is not F
 precluded from making a profit for the public benefit”.

(emphasis added)

The use of the alternative is significant. The Court scrutinised the
 history of the formation of the three Corporations, the financial support given G
 by the Central Government, the utilization of the finances so provided, the
 nature of service rendered and noted that despite the fact that each of the
 Corporations ran on profits earned by it nevertheless the structure of each of

7. [1969] 3 SCR 773.

8. [1975] 3 SCR 619.

A the Corporations showed that the three Corporations represented the 'voice and hands' of the Central Government. The Court came to the conclusion that although the employees of the three Corporations were not servants of the Union or the State, "these statutory bodies are 'authorities' within the meaning of Article 12 of the Constitution".

B Mathew J in his concurring judgment went further and propounded a view which presaged the subsequent developments in the law. He said:

C "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. . "

For identifying such an agency or instrumentality he propounded four indicia:

D (1) "A finding of the state financial support plus an unusual degree of control over the management and policies might lead one to characterize an operation as state action. "

(2) "Another factor which might be considered is whether the operation is an important public function. "

E (3) "The combination of state aid and the furnishing of an important public service may result in a conclusion that the operation should be classified as a state agency. If a given function is of such public importance and so closely related to a governmental functions as to be classified as a government agency, then even the presence or absence of state financial aid might be irrelevant in making a finding of state action. If the function does not fall within such a description then mere addition of state money would not influence the conclusion."

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G (4) "The ultimate question which is relevant for our purpose is whether such a corporation is an agency or instrumentality of the government for carrying on a business for the benefit of the public. In other words, the question is, for whose benefit was the corporation carrying on the business?"

H *Sabhajit Tewary* was decided by the same Bench on the same day as *Sukhdev Singh* (supra). The contentions of the employee was that CSIR is an agency of the Central Government on the basis of the CSIR Rules which, it

was argued, showed that the Government controlled the functioning of CSIR in all its aspects. The submission was somewhat cursorily negated by this Court on the ground that all this

.....“will not establish anything more than the fact that the Government takes special care that the promotion, guidance and co-operation of scientific and industrial research, the institution and financing of specific researches, establishment or development and assistance to special institutions or departments of the existing institutions for scientific study of problems affecting particular industry in a trade, the utilisation of the result of the researches conducted under the auspices of the Council towards the development of industries in the country are carried out in a responsible manner.”

Although the Court noted that it was the Government which was taking the “special care” nevertheless the writ petition was dismissed ostensibly because the Court factored into its decision two premises:

- (i) “The society does not have a statutory character like the Oil and Natural Gas Commission or the Life Insurance Corporation or Industrial Finance Corporation. It is a Society incorporated in accordance with the provisions of the Society’s Registration Act”, and
- (ii) “This Court has held in *Praga Tools Corporation v. Shri C.A. Imanuel and Ors.*, [1969] 3 SCR 773, *Heavy Engineering Mazdoor Union v. The State of Bihar and Ors.*, [1969] 3 SCR 995 and in *S.L. Agarwal v. General Manager Hindustan Steel Ltd.*, [1970] 3 SCR 363 that the Praga Tools Corporation, Heavy Engineering Mazdoor Union and Hindustan Steel Ltd. are all companies incorporated under the Companies Act and the employees of these companies do not enjoy the protection available to Government servants as contemplated in Article 311. The companies were held in these cases to have independent existence of the Government and by the law relating to corporations. These could not be held to be departments of the Government”.

With respect, we are of the view that both the premises were not really relevant and in fact contrary to the ‘voice’ and ‘hands’ approach in *Sukhdev Singh*. Besides reliance by the Court on decisions pertaining to Article 311 which is contained in Part XIV of the Constitution was inapposite. What was under consideration was Art. 12 which by definition is limited to Part III and

A by virtue of Art. 36 to Part IV of the Constitution. As said by another Constitution Bench later in this context:⁹

B “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 C IV would not be so for the purpose of Part XIV or any other provision of the Constitution. This is why the decisions of this Court in *S.L. Aggarwal v. Hindustan Steel Ltd.*, and other cases involving the applicability of Article 311 have no relevance to the issue before us”.

D Normally, a precedent like *Sabhajit Tewary* which has stood for a length of time should not be reversed, however erroneous the reasoning if it has stood unquestioned, without its reasoning being ‘distinguished’ out of all recognition by subsequent decisions and if the principles enunciated in the earlier decision can stand consistently and be reconciled with subsequent decisions of this Court, some equally authoritative. In our view *Sabhajit E Tewary* fulfills both conditions.

F Side-stepping the majority approach in *Sabhajit Tewary*, the ‘drastic changes’ in the perception of ‘State’ heralded in *Sukhdev Singh* by Mathew, J and the tests formulated by him were affirmed and amplified in *Ramana v. International Airport Authority of India*.¹⁰ Although the International Airport Authority of India is a statutory corporation and therefore within the accepted connotation of State, the Bench of three Judges developed the concept of State. The rationale for the approach was the one adopted by Mathew J in *Sukhdev Singh*:

G“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

9. *Ajay Hasia v. Khalid Mujib Sehravardi*, [1981] 1 SCR 722.

H 10. AIR (1979) SC 1628.

tasks of the Government multiplied with the advent of the welfare State, it began to be increasingly felt that the frame work of civil service was not sufficient to handle the new tasks which were often of specialised and highly technical character. 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 public corporation came into being as the third arm of the Government".

From this perspective, the logical sequitur is that it really does not matter what guise the State adopts for this purpose, whether by a Corporation established by statute or incorporated under a law such as the Companies Act or formed under the Societies Registration Act, 1860. Neither the form of the Corporation, nor its ostensible autonomy would take away from its character as 'State' and its constitutional accountability under Part III *vis-a-vis* the individual if it were in fact acting as an instrumentality or agency of Government.

As far as *Sabhajit Tewary* was concerned it was 'explained' and distinguished in *Ramana* saying:

"The Court no doubt took the view on the basis of facts relevant to the constitution and functioning of the Council that it was not an 'authority', but we do not find any discussion in this case as to what are the features which must be present before a corporation can be regarded as an 'authority' within the meaning of Art. 12. This decision does not lay down any principle or test for the purpose of determining when a corporation can be said to be an 'authority'. If at all any test can be gleaned from the decision, it is whether the Corporation is 'really an agency of the Government'. The Court seemed to hold on the facts that the Council was not an agency of the Government and was, therefore, not an 'authority' "

The tests propounded by Mathew, J in *Sukhdev Singh* were elaborated in *Ramana* and were re-formulated two years later by a Constitution Bench in *Ajay Hasia v. Khalid Mujib Sehravardi*.¹¹ What may have been technically characterised as 'obiter dicta' in *Sukhdev Singh* and *Ramana* (since in both cases the "authority" in fact involved was a statutory corporation), formed

11. [1981] 1 SCC 722,

- A** the ratio decidendi of *Ajay Hasia*. The case itself dealt with a challenge under Article 32 to admissions made to a college established and administered by a Society registered under the Jammu & Kashmir Registration of Societies Act 1898. The contention of the Society was that even if there were an arbitrary procedure followed for selecting candidates for admission, and that
- B** this may have resulted in denial of equality to the petitioners in the matter of admission in violation of Article 14, nevertheless Article 14 was not available to the petitioners because the Society was not a State within Art. 12.

The Court recognised that:

- C**“Obviously the Society cannot be equated with the Government of India or the Government of any State nor can it be said to be a local authority and therefore, it must come within the expression “other authorities” if it is to fall within the definition of ‘State’ “. But it said that:

- D** “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”.
- E**

It was made clear that the genesis of the corporation was immaterial and that:

- F**“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”.

- G** *Ramana* was noted and quoted with approval in extenso and the tests propounded for determining as to when a corporation can be said to be an instrumentality or agency of the Government therein were culled out and summarised as follows:

- H** (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. **A**

(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. **B**

(3) It may also be a relevant factor.....whether the corporation enjoys monopoly status which is State conferred or State protected

(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. **C**

(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.

(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. **D**

In dealing with *Sabhajit Tewary* the Court in *Ajay Hasia* noted that since *Sabhajit Tewary* was a decision given by a Bench of Five Judges of this Court it was undoubtedly binding. The Court read *Sabhajit Tewary* as implicitly assenting to the proposition that CSIR could have been an instrumentality or agency of the Government even though it was a Registered Society and limited the decision to the facts of the case. It held that the Court in *Sabhajit Tewary* : **E**

“did not rest its conclusion on the ground that the council was a society registered under the Societies Registration Act, 1860, but proceeded to consider various other features of the council for arriving at the conclusion that it was not an agency of the government and therefore not an ‘authority’”. **F**

The conclusion was then reached applying the tests formulated to the facts that the Society in *Ajay Hasia* was an authority falling within the definition of “State” in Article 12. **G**

On the same day that the decision in *Ajay Hasia* was pronounced came **H**

A the decision of *Som Prakash Rekhi v. Union of India*.¹² Here too, the reasoning in *Ramana* was followed and Bharat Petroleum Corporation was held to be a 'State' within the "enlarged meaning of Art. 12". *Sabhajit Tewary* was criticised and distinguished as being limited to the facts of the case. It was said:

B "The rulings relied on are, unfortunately, in the province of Art. 311 and it is clear that a body may be 'State' under Part III but not under Part XIV. Ray, C.J., rejected the argument that merely because the Prime Minister was the President or that the other members were appointed and removed by Government did not make the Society a 'State'. With great respect, we agree that in the absence of the other features elaborated in *Airport Authority* case [1979] 3 SCC 489: (AIR 1979 SC 1628) the composition of the Government Body alone may not be decisive. The laconic discussion and the limited ratio in *Tewary* [1975] 3 SCR 616 : (AIR 1975 SC 1329) hardly help either side here."

D The tests to determine whether a body falls within the definition of 'State' in Article 12 laid down in *Ramana* with the Constitution Bench imprimatur in *Ajay Hasia* form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited.

E In *P.K. Ramachandra Iyer and Ors. v. Union of India and Ors.*, [1984] 2 SCC 141, it was held that both the Indian Council of Agricultural Research (ICAR) and its affiliate Indian Veterinary Research Institute were bodies as would be comprehended in the expression 'other authority' in Article 12 of the Constitution. Yet another judicial blow was dealt to the decision in *Sabhajit Tewary* when it was said:

F "Much water has flown down the Jamuna since the dicta in *Sabhajit Tewary* case and conceding that it is not specifically overruled in later decision, its ratio is considerably watered down so as to be a decision confined to its own facts."

G *B.S. Minhas v. Indian Statistical Institute and Ors.*¹³ held that the Indian Statistical Institute, a registered Society is an instrumentality of the Central Government and as such is an 'authority' within the meaning of Article 12.

12. AIR (1981) SC 212.

H 13. [1984] 1 SCR 395.

of the Constitution. The basis was that the composition of respondent No. 1 is dominated by the representatives appointed by the Central Government. The money required for running the Institute is provided entirely by the Central Government and even if any other moneys are to be received by the Institute it can be done only with the approval of the Central Government, and the accounts of the Institute have also to be submitted to the Central Government for its scrutiny and satisfaction. The Society has to comply with all such directions as may be issued by the Central Government. It was held that the control of the Central Government is deep and pervasive.

The decision in *Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguli*¹⁴ held that the appellant company was covered by Article 12 because it is financed entirely by three Governments and is completely under the control of the Central Government and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it and also that the activities carried on by the Corporation are of vital national importance. However, the tests propounded in *Ajay Hasia* were not applied in *Tekraj Vasandi alias K.S. Basandhi v. Union of India and Ors.* [1988] 1 SCC 237, where the Institute of Constitutional and Parliamentary Studies (ICPS), a society registered under the Societies Registration Act, 1860 was held not to be an "other authority" within the meaning of Article 12. The reasoning is not very clear. All that was said was :

"Having given our anxious consideration to the facts of this case, we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of 'other authorities' in Article 12 of the Constitution"

However, the Court was careful to say that "ICPS is a case of its type typical in many ways and the normal tests may perhaps not properly apply to test its character".

All India Sainik Schools Employees' Association v. Defence Minister-cum-Chairman Board of Governors, Sainik Schools Society, New Delhi and Ors. [1989] Supp. 1 SCC 205 held applying the tests indicated in *Ajay Hasia* that the Sainik School Society is a 'State'.

Perhaps this rather over - enthusiastic application of the broad limits set by *Ajay Hasia* may have persuaded this Court to curb the tendency in *Chander*

- A *Mohan Khanna v. National Council of Educational Research and Training and Ors.*, [1991] 4 SCC 578. The Court referred to the tests formulated in *Sukhdev Singh, Ramana, Ajay Hasia*, and *Som Prakash Rekhi* but striking a note of caution said that “these are merely indicative indicia and are by no means conclusive or clinching in any case”. In that case, the question arose
- B whether the National Council of Educational Research (NCERT) was a ‘State’ as defined under Article 12 of the Constitution. The NCERT is a society registered under the Societies Registration Act. After considering the provisions of its Memorandum of Association as well as the rules of NCERT, this Court came to the conclusion that since NCERT was largely an autonomous body and the activities of the NCERT were not wholly related to governmental
- C functions and that the Government control was confined only to the proper utilisation of the grant and since its funding was not entirely from Government resources, the case did not satisfy the requirements of the State under Article 12 of the Constitution. The Court relied principally on the decision in *Tekraj Vasandi @ K.L. Basandhi v. Union of India* (supra) However, as far as the decision in *Sabhajit Tewary v. Union of India* (supra) was concerned, it was
- D noted that “the decision has been distinguished and watered down in the subsequent decisions”.

- Fresh off the judicial anvil is the decision in the *Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers Association*, JT (2002) 1 SC 61
- E which fairly represents what we have seen as a continuity of thought commencing from the decision in *Rajasthan Electricity Board* in 1967 upto the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public interest under the control of the Government is ‘an
- F authority’ within the meaning of Art. 12.

- The picture that ultimately emerges is that the tests formulated in *Ajay Hasia* are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning
- G of Article 12. The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand,
- H when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State.

Coming now to the facts relating to CSIR, we have no doubt that it is well within the range of Article 12, a conclusion which is sustainable when judged according to the tests judicially evolved for the purpose. A

The Formation of CSIR

On 27th April 1940 the Board of Scientific and Industrial Research and on 1st February 1941, the Industrial Research Utilisation Committee were set up by the Department of Commerce, Government of India with the broad objective of promoting industrial growth in this country. On 14th November 1941, a resolution was passed by the Legislative Assembly and accepted by the Government of India to the following effect: B

“This Assembly recommends to the Governor General in Council that a fund called the Industrial Research Fund be constituted, for the purpose of fostering industrial development in this country and that provision be made in the Budget for an annual grant of rupees ten lakhs to the fund for a period of five years.” C

For the purpose of coordinating and exercising administrative control over the working of the two research bodies already set up by the Department of Commerce, and to oversee the proper utilisation of the Industrial Research Fund, by a further resolution dated 26th September 1942, the Government of India decided to set up a Council of Industrial Research on a permanent footing which would be a registered society under the Registration of Societies Act, 1860. Pursuant to the resolution, on 12th March, 1942 the CSIR was duly registered. Bye-laws and Rules were framed by the Governing Body of the Society in 1942 which have been subsequently revised and amended. Unquestionably this shows that the CSIR was ‘created’ by the Government to carry on in an organized manner what was being done earlier by the Department of Commerce of the Central Government. In fact the two research bodies which were part of the Department of Commerce have since been subsumed in the CSIR. D E F

Objects and Functions:

The 26th September 1942 Resolution had provided that the functions of the CSIR would be: G

- (a) to implement and give effect to the following resolution moved by the Hon’ble Dewan Bahadur Sir A.R. Mudaliar and passed by the Legislative Assembly on the 14th Nov’ 1941 and accepted by H

- A the Government of India.....(quoted earlier in this Judgment)
- (b) the promotion, guidance and co-ordination of scientific and industrial research in India including the institution and the financing of specific researches;
- B (c) the establishment or development and assistance to special institutions or Department of existing institutions for scientific study of problems affecting particular industries and trade;
- (d) the establishment and award of research student-ships and fellowships;
- C (e) the utilisation of the results of the researches conducted under the auspices of the Council towards the development of industries in the country and the payment of a share of royalties arising out of the development of the results of researches to those who are considered as having contributed towards the pursuit of such researches;
- D (f) the establishment, maintenance and management of laboratories, workshops, institutes, and organisation to further scientific and industrial research and utilise and exploit for purposes of experiment or otherwise any discovery or invention likely to be of use of Indian Industries;
- E (g) the collection and dissemination of information in regard not only to research but to industrial matters generally;
- (h) publication of scientific papers and a journal of industrial research and development, and
- F (i) any other activities to promote generally the objects of the resolution mentioned in (a) above.

These objects which have been incorporated in the Memorandum of Association of CSIR manifestly demonstrate that CSIR was set up in the national interest to further the economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in *Rajasthan Electricity Board v. Mohan Lal*, (Supra) where it was said:

H “The State, as defined in Art. 12, is thus comprehended to include bodies created for the purpose of promoting the educational and

economic interests of the people".

We are in respectful agreement with this statement of the law. The observations to the contrary in *Chander Mohan Khanna v. NCERT* (supra) relied on by the Learned Attorney General in this context, do not represent the correct legal position.

Incidentally, the CSIR was and continues to be a non-profit making organization and according to clause (4) of CSIR's Memorandum of Association, all its income and property, however derived shall be applied only 'towards the promotion of those objects subject nevertheless in respect of the expenditure to such limitations as the Government of India may from time to time impose'.

Management and Control:

When the Government of India resolved to set up the

CSIR on 26th February, 1942 it also decided that the Governing Body would consist of the following members:

- (1) The Honourable Member of the Council of His Excellency the Governor General in charge of the portfolio of Commerce (Ex-officio).
- (2) A representative of the Commerce Department of the Government of India, appointed by the Government of India.
- (3) A representative of the Finance Department of the Government of India, appointed by the Government of India.
- (4) Two members of the Board of Scientific and Industrial Research elected by the said Board.
- (5) Two members of the Industrial Research Utilisation committee elected by the said Committee.
- (6) The Director of Scientific and Industrial Research.
- (7) One or more members to be nominated by the Government of India to represent interests not otherwise represented.

The present Rules and Regulations 1999 of CSIR provide that :

- (a) The Prime Minister of India shall be the ex-officio President of

- A the Society.
- (b) The Minister-in-Charge of the Ministry or Deptt. dealing with the Council of Scientific & Industrial Research shall be the *ex-officio* Vice President of the Society.

B Provided that during any period when the Prime Minister is also such Minister, any person nominated in this behalf by the Prime Minister shall be the Vice-President.

(c) Ministers Incharge of Finance and Industry (*ex-officio*).

C (d) The members of the Governing Body.

(e) Chairman, Advisory Board.

(f) Any other person or persons appointed by the President, CSIR. ”

The Governing Body of the Society is constituted by the:

D (a) Director General,

(b) Member Finance,

(c) Directors of two National Laboratories,

E (d) Two eminent Scientists/ Technologists, one of whom shall be from Academia; (e) Heads of two Scientific Departments/Agencies of the Government of India.

The dominant role played by the Government of India in the Governing Body of CSIR is evident. The Director-General who is *ex-officio* Secretary

F of the Society is appointed by the Government of India [Rule 2 (iii)]. The submission of the learned Attorney General that the Governing Body consisted of members, the majority of whom were non-governmental members is, having regard to the facts on record, unacceptable. Furthermore, the members of the Governing Body who are not there *ex officio* are nominated by the President

G and their membership can also be terminated by him and the Prime Minister is the *ex-officio* President of CSIR. It was then said that although the Prime Minister was *ex-officio* President of the Society but the power being exercised by the Prime Minister is as President of the Society. This is also the reasoning in *Sabhajit Tewary*. With respect, the reasoning was and the submission is erroneous. An *ex-officio* appointment means that the appointment is by virtue

H of the office; without any other warrant or appointment than that resulting

from the holding of a particular office. Powers may be exercised by an officer, in this case the Prime Minister, which are not specifically conferred upon him, but are necessarily implied in his office (as Prime Minister), these are *ex-officio*.¹⁵ A

The control of the Government in the CSIR is ubiquitous. The Governing Body is required to administer, direct and control the affairs and funds of the Society and shall, under Rule 43, have authority 'to exercise all the powers of the Society subject nevertheless in respect of expenditure to such limitations as the Government of India may from time to time impose'. The aspect of financial control by the Government is not limited to this and is considered separately. The Governing Body also has the power to frame, amend or repeal the bye-laws of CSIR but only with the sanction of the Government of India. Bye-law 44 of the 1942 Bye-laws had provided 'any alteration in the bye-laws shall require the prior approval of the Governor General in Council'. B C

Rule 41 of the present Rules provide that: D

"The President may review/amend/vary any of the decisions of the Governing Body and pass such orders as considered necessary to be communicated to the Chairman of the Governing Body within a month of the decision of the Governing Body and such order *shall be binding on the Governing Body*. The Chairman may also refer any question which in his opinion is of sufficient importance to justify such a reference for decision of the President, which shall be binding on the Governing Body. " E

(emphasis added) F

Given the fact that the President of CSIR is the Prime Minister, under this Rule the subjugation of the Governing Body to the will of the Central Government is complete.

As far as the employees of the CSIR are concerned the Central Civil Services (Classification, Control & Appeal) Rules and the Central Civil Services (Conduct) Rules, for the time being in force, are from the outset applicable to them subject to the modification that references to the 'President' and 'Government Servant' in the Conduct Rules would be construed as 'President of the Society' and 'Officer & establishments in the service of the G H

15. Black's Law Dictionary

- A Society' respectively. (Bye Law 12). The scales of pay applicable to all the employees of CSIR are those prescribed by the Government of India for similar personnel, save in the case of specialists (Bye Law 14) and in regard to all matters concerning service conditions of employees of the CSIR, the Fundamental and Supplementary Rules framed by the Govt. of India and such other rules and orders issued by the Govt. of India from time to time
- B are also, under Bye Law 15 applicable to the employees of the CSIR. Apart from this, the rules/Orders issued by Government of India regarding reservation of posts for SC/ST apply in regard to appointments to posts to be made in CSIR. (Bye Law 19) The CSIR cannot lay down or change the terms and conditions of service of its employees and any alteration in the bye-laws can
- C be carried out only with the approval of Government of India. (Bye Law 20).

Financial Aid

The initial capital of the CSIR was Rs. 10 lakhs, made available pursuant to the Resolution of the Legislative Assembly on 14th November, 1941.

- D Paragraph 5 of the 26th September, 1942 Resolution of the Government of India pursuant to which CSIR was formed reads:

E "The Government of India have decided that a fund, viz., the Industrial Research Fund, should be constituted by grants from the Central Revenues to which additions are to be made from time to time as moneys flow in from other sources. These 'other sources' will comprise grants, if any, by Provincial Governments by industrialists for special or general purposes, contributions from Universities or local bodies, donations or benefactions, royalties, etc., received from the development of the results of industrial research, and miscellaneous receipts. The Council of Scientific and Industrial Research will exercise

F full powers in regard to the expenditure to be met out of the Industrial Research Fund subject to its observing the Bye-laws framed by the Governing Body of the Council, from time to time, *with the approval of the Governor General-in-Council, and to its annual budget being approved by the Governor General-in-Council.*"

- G As already noted, the initial capital of Rs. 10 lakhs was made available by the Central Government. According to the statement handed up to the Court on behalf of CSIR the present financial position of CSIR is that at least 70% of the funds of CSIR are available from grants made by the Government of India. For example out of the total funds available to CSIR for the years
- H 1998-99, 1999-2000, 2000-01 of Rs. 1023. 68 crores, Rs. 1136.69 crores and

Rs. 1219. 04 crores respectively, the Government of India has contributed Rs. 713.32 crores, Rs. 798.74 crores and Rs. 877.88 crores. A major portion of the balance of the funds available is generated from charges for rendering research and development works by CSIR for projects such as the Rajiv Gandhi Drinking Water Mission Technology Mission on oilseeds and pulses and maize or grant in aid projects from other Government Departments. Funds are also received by CSIR from sale proceeds of its products, publications, royalties etc. Funds are also received from investments but under Bye-Law 6 of CSIR, funds of the Society may be invested only in such manner as prescribed by the Government of India. Some contributions are made by the State Governments and to a small extent by 'individuals, institutions and other agencies'. The non-governmental contributions are a pittance compared to the massive governmental input.

As far as expenditure is concerned, under Bye-law (1) as it stands at present, the budget estimates of the Society are to be prepared by the Governing Body 'keeping in view the instructions issued by the Government of India from time to time in this regard'. Apart from an internal audit, the accounts of the CSIR are required to be audited by the Controller and Auditor General and placed before the table of both Houses of Parliament (Rule 69).

In the event of dissolution, unlike other registered societies which are governed by Section 14 of the Societies Registration Act, 1860, the members of CSIR have no say in the distribution of its assets and under clause (5) of the Memorandum of Association of CSIR, on the winding up or dissolution of CSIR any property remaining after payment of all debts shall have to be dealt with "in such manner as the Government of India may determine". CSIR is therefore both historically and in its present operation subject to the financial control of the Government of India. The assets and funds of CSIR though nominally owned by the Society are in the ultimate analysis owned by the Government. From whichever perspective the facts are considered there can be no doubt that the conclusion reached in *Sabhajit Tewary* was erroneous. If the decision of *Sabhajit Tewary* had sought to lay down as a legal principle that a society registered under the Societies Act or a company incorporated under the Companies Act is, by that reason alone, excluded from the concept of State under Article 12, it is a principle which has long since been discredited. "Judges have made worthy, if shamefaced, efforts, while giving lip service to the rule, to riddle it with exceptions and by distinctions reduce it to a shadow".¹⁶

16. Benjamin Cardozo : *The Nature of the Judicial Process* 1921.

A In the assessment of the facts, the Court had assumed certain principles, and sought precedential support from decisions which were irrelevant and had “followed a groove chased amidst a context which has long since crumbled”.¹⁷ Had the facts been closely scrutinised in the proper perspective, it could have led and can only lead to the conclusion that CSIR is a State within the meaning of Art. 12.

B *Should Sabhajit Tewary* still stand as an authority even on the facts merely because it has stood for 25 years? We think not. Parallels may be drawn even on the facts leading to an untenable interpretation of Art. 12 and a consequential denial of the benefits of fundamental rights to individuals who would otherwise be entitled to them and “there is nothing in our Constitution which prevents us from departing from a previous decision if we are convinced of its error and its baneful effect on the general interests of the public.”¹⁸ Since on a re-examination of the question we have come to the conclusion that the decision was plainly erroneous, it is our duty to say so and not perpetuate our mistake.

C Besides a new fact relating to CSIR has come to light since the decision in *Sabhajit Tewary* which unequivocally vindicates the conclusion reached by us and fortifies us in delivering the *coup de grace* to the already attenuated decision in *Sabhajit Tewary*. On 31st October 1986 in exercise of the powers conferred by sub-section (2) of Section 14 of the Administrative Tribunals Act, 1985, the Central Government specified 17th November 1986 as the date on and from which the provisions of sub-section (3) of Section 14 of the 1985 Act would apply to CSIR ‘being the Society owned and controlled by Government’.

D The learned Attorney General contended that the notification was not conclusive of the fact that the CSIR was a State within the meaning of Article 12 and that even if an entity is not a State within the meaning of Article 12, it is open to the Government to issue a notification for the purpose of ensuring the benefits of the provisions of the Act to its employees.

E We cannot accept this. Reading Art. 323 (A) of the Constitution and Section 14 of the 1985 Act it is clear that no notification under section 14(2) of the Administrative Tribunals Act could have been issued by the Central

17. *Union of India and Anr., v. Raghubir Singh (dead) by Lrs. etc.* [1989] 2 SCC 754 at 768, 769 and *Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay etc.*, [1974] 2 SCC 402.

F 18. *Bengal Immunity Co Ltd. v. State of Bihar and Ors.*, AIR [1955] SC 661, 672.

Government unless the employees of the CSIR were either appointed to public services and posts in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government. Once such a notification has been issued in respect of CSIR, the consequence will be that an application would lie at the instance of the appellants at least before the Administrative Tribunal. No new jurisdiction was created in the Administrative Tribunal. The notification which was issued by the Central Government merely served to shift the service disputes of the employees of CSIR from the constitutional jurisdiction of the High Court under Article 226 to the Administrative Tribunals on the factual basis that CSIR was amenable to the writ jurisdiction as a State or other authority under Article 12 of the Constitution.¹⁹

Therefore, the notification issued in 1986 by the Central Government under Article 14 (2) of the Administrative Tribunals Act, 1985 serves in removing any residual doubt as to the nature of CSIR and decisively concludes the issues before us against it.

Sabhajit Tewary's decision must be and is in the circumstances overruled. Accordingly the matter is remitted back to the appropriate Bench to be dealt with in the light of our decision. There will be no order as to costs.

R.C. LAHOTI, J. (for self and on behalf of Doraiswamy Raju, J.)

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

19. *S.R.S. Kumar v. Union of India*, AIR (1987) SC 386 and *L. Chandra Kumar v. Union of India*, (1997) 3 SCC 261.

A cannot be obliterated.

Article 12 of the Constitution reads as under:

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

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

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

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

G If that proposition is accepted-and I do not see anyone who cares for Fundamental Rights can object to such a universal obligation being imposed upon *every authority created by law*-then, what are we to do to make our intention clear? There are two ways of doing it. One way is to use a composite phrase such as “the State”, as we

H

have done in article 7; or, to keep on repeating every time, “the Central Government, the Provincial Government, the State Government, the Municipality, the Local Board, the Port Trust, or any other authority”. It seems to me not only most cumbersome but stupid to keep on repeating this phraseology every time we have to make a reference to some authority. The wisest course is to have this comprehensive phrase and to economise in words”.

(1948 (Vol. VII) CAD 610)

[emphasis supplied]

Thus the framers of the Constitution used the word “the State” in a wider sense than what is understood in the ordinary or narrower sense. So far as ‘other authorities’ are concerned they were included subject to their satisfying the test of being ‘within the territory of India’ or being ‘under the control of the Government of India’. It is settled that the expression ‘under the control of the Government of India’ in Article 12 does not qualify the word ‘territory’; it qualifies ‘other authorities’.

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

Instrumentality, Agency, Authority - meaning of

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

Black’s Law Dictionary (Seventh Edition) defines ‘instrumentality’ to mean “a means or agency through which a function of another entity is accomplished, such as a branch of a governing body.” ‘Agency’ is defined as “a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal)

A and bind that other party by words or actions. ” Thus instrumentality and agency are the two terms which to some extent overlap in their meaning; ‘instrumentality’ includes ‘means’ also, which ‘agency’ does not, in its meaning. ‘Quasi- governmental agency’ is “a government - sponsored enterprise or Corporation (sometimes called a government-controlled corporation)”. Authority, as Webster Comprehensive Dictionary (International Edition) defines, is “the person or persons in whom government or command is vested; often in the plural”. The applicable meaning of the word “authority” given in Webster’s Third New International Dictionary, is ‘a public administrative agency or corporation having quasi-governmental powers and authorized to administer a revenue-producing public enterprise’. This was quoted with approval by Constitution Bench in *RSEB’s* case (infra) wherein the Bench held - “This dictionary meaning of the word “authority” is clearly wide enough to include *all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions*. The expression “other authorities” is wide enough to include within it every authority *created by a statute* and functioning within the territory of India, or *under the control* of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words “other authorities” are used in Art. 12 of the Constitution”. (emphasis added)

E With the pronouncements in *N. Masthan Sahib v. The Chief Commissioner, Pondicherry and Anr.*, [1962] Supp. 1 SCR 981 and *K.S. Ramamurthy Reddiar v. Chief Commissioner, Pondicherry and Anr.*, [1964] 1 SCR 656 it is settled that Article 12 of the Constitution has to be so read:

“12. In this part, unless the context otherwise requires, the ‘State’ includes

- F
- (i) the Government and Parliament of India,
 - (ii) the Government and the Legislature of each State,
 - (iii) (a) all local or other authorities within the territory of India,
 - G (b) all local or other authorities under the control of the Government of India. ”

H The definition of the State as contained in Article 12 is inclusive and not conclusive. The net of Article 12 has been expanded by ‘progressive’ judicial thinking, so as to include within its ken several instrumentalities and agencies performing State function or entrusted with State action. To answer the

principal question in the context in which it has arisen, incidental but inseparable issues do arise: Wide expansion but how far wide? Should such wide expansion be not subject to certain wise limitations? True, the width of expansion and the wisdom of limitations both have to be spelled out from Article 12 itself and the fundamentals of constitutional jurisprudence. A

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

A review of judicial opinion

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

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

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

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

H In *Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi*

and *Anr.*, (supra), question arose whether Oil and Natural Gas Commission, the Industrial Finance Corporation and Life Insurance Corporation are 'authorities' within the meaning of Article 12. The case was decided by a majority of 4:1. A.N. Ray, CJ speaking for himself and on behalf of Y.V. Chandrachud and A.C. Gupta, JJ. held that all the three were statutory Corporations, i.e., given birth by Statutes. The circumstance that these statutory bodies were required to carry on some activities of the nature of trade or commerce did not make any difference. The Life Insurance Corporation is (i) an agency of the Government (ii) carrying on the exclusive business of Life Insurance (i.e. in monopoly), and (iii) each and every provision of the Statute creating it showed in no uncertain terms that the Corporation is the voice and the hands of the Central Government. The Industrial Financial Corporation is in effect managed and controlled by the Central Government, citizens cannot be its shareholder. ONGC (i) is owned by the Government, (ii) is a statutory body and not a company and (iii) has the exclusive privilege of extracting petroleum. Each of the three, respectively under the three Acts under which they are created, enjoy power to do certain acts and to issue directions obstruction in or breach whereof is punishable as an offence. These distinguish them from a mere company incorporated under the Indian Companies Act. The common features of the three are (i) rules and regulations framed by them have the force of law, (ii) the employees have a statutory status, and (iii) they are entitled to declaration of being in employment when the dismissal or removal is in contravention of statutory provisions. The learned Chief Justice added, by way of abundant caution, that these provisions did not however make the employees as servants of the Union or the State though the three statutory bodies are authorities within the meaning of Article 12 of the Constitution.

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

A decisions and some other authorities, he laid down certain principles with which we will deal with a little later and at appropriate place. He observed that institutions engaged in matters of high public interest or performing public functions are, by virtue of the nature of the function performed by them, governmental agencies. He noticed the difficulty in separating vital government functions from non-governmental functions in view of the contrast between governmental activities which are private and private activities which are governmental. For holding Life Insurance Corporation "the State" he relied on the following features : (i) the Central Government has contributed the original capital of the Corporation, (ii) part of the profit of the Corporation goes to Central Government, (iii) the Central Government exercises control over the policy of the Corporation, (iv) the Corporation carries on a business having great public importance, and (v) it enjoys a monopoly in the business. As to Industrial Financial Corporation he relied on the circumstances catalogued in the judgment of A.N. Ray, J. The common feature of the two Corporations was that they were instrumentalities or agencies of the State for carrying on business which otherwise would have been run by the State departmentally and if the State had chosen to carry on these businesses through the medium of government departments, there would have been no question that actions of these departments would be "state actions". At the end Mathew, J. made it clear that he was expressing no opinion on the question whether private Corporations or other like organizations though they exercise power over their employees which might violate their fundamental rights would be the State within the meaning of Article 12. What is 'state action' and how far the concept of 'state action' can be expanded, posing the question, Mathew J. answered " . it is against State action that fundamental rights are guaranteed. Wrongful individual acts unsupported by State authority in the shape of laws, customs, or judicial or executive proceeding are not prohibited. Articles 17, 23 and 24 postulate that fundamental rights can be violated by private individuals and that the remedy under Article 32 may be available against them. But by and large, unless an act is sanctioned in some way by the State, the action would not be State action. In other words, until some law is passed or some action is taken through officers or agents of the State, there is no action by the State. " So also commenting on the relevance of 'state help' and 'state control' as determinative tests, Mathew, J. said "It may be stated generally that State financial aid alone does not render the institution receiving such aid a state agency. Financial aid plus some additional factor might lead to a different conclusion. A mere finding of state control also is not determinative of the question, since a state has considerable measure of control under its police power over all types of business operations."

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

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

"The ratio of this decision may thus be stated to be that a constitutional or statutory authority would be within the meaning of the expression 'other authorities', if it has been invested with statutory power to issue binding directions to third parties, the disobedience of which would entail penal consequence or it has the sovereign power to make rules and regulations having the force of law".

He then referred to what he termed as a 'broader test' laid down by Mathew, J. in *Sukhdev Singh's* case and said that judgment by Mathew, J. provided 'one more test and perhaps a more satisfactory one' for determining whether a statutory corporation, body or other authority falls within the definition of 'the State' and the test is—"If a statutory corporation, body or other authority is an instrumentality or agency of government, it would be an authority and therefore 'the State' within the meaning of the expression in Article 12." Having minutely examined the provisions of the International Airport Authority Act, 1971 he found out the following features of IA :- (i) The Chairman and Members are all persons nominated by the Central Government and Central Government has power to terminate the appointment or remove them; (ii) The Central Government is vested with the power to take away the management of any airport from the IA; (iii) The Central Government has power to give *binding directions* in writing on questions of policy; (iv) The capital of IA needed for carrying out its functions is *wholly* provided by Central Government; (v) The balance of net *profit* made by IA,

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

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

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

classifying the corporation as an instrumentality or agency of Government. A

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. B

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

In *Ajay Hasia*, the 'authority' under consideration was a society registered under the Jammu & Kashmir Registration of Societies Act, 1898, administering and managing the Regional Engineering College, Srinagar. The College was sponsored by the Government of India. The prominent features of the society indicated *complete* financing and financial control of the Government, *complete* administrative control over conducting of the affairs of the society and administration and assets of the College being *taken over* by the State Government with the prior approval of the Central Government. These are some of the material features. Some of the observations made by the Court during the course of its judgment are pertinent and we proceed to notice them quickly. The society could not be equated with the Government of India or the Government of any State nor could it be said to be 'local authority', and therefore, should have come within the expression of 'other authorities' to be 'the State'. The Government may act through the instrumentality or agency of natural persons or it may employ the instrumentality or agency of juridical persons to carry out its functions. With the enlargement of governmental activities, specially those in the field of trade and commerce and welfare, corporation is most resourceful legal contrivance resorted to frequently by the Government. Though a distinct juristic entity came into existence because of its certain advantages in the field of functioning over a department of the Government but behind the formal ownership cast in the corporate mould, the reality is very much the D E F G H

A deeply pervasive presence of the Government. It is really the Government which acts through the instrumentality or agency of the Corporation and the juristic veil of corporate personality is worn for the purpose of convenience of management and administration which cannot be allowed to obliterate the true nature of the reality behind which is the Government. Dealing at length with the corporate contrivance, the Court summed up its conclusion by saying that if a Corporation is found to be a mere agency or surrogate of the Government, 3 tests being satisfied viz., (i) in fact, owned by the Government, (ii) in truth, control by the Government, and (iii) in effect, an incarnation of the Government, then the Court would hold the Corporation to be Government, and therefore, subject to constitutional limitations including for enforcement of fundamental rights. The Court went on to say that where a Corporation is an instrumentality or agency of the Government, it must be held to be an 'authority' for Article 12.

Here itself we have few comments to offer. Firstly, the distinction between 'instrumentality and agency' on the one hand, and 'authority (for the purpose of 'other authorities')' on the other, was totally obliterated. In our opinion, it is one thing to say that if an entity veiled or disguised as a Corporation or a society or in any other form is found to be an instrumentality or agency of the State then in that case it will be the State itself in narrower sense acting through its instrumentality or agency and therefore, included in 'the State' in the wider sense for the purpose of Article 12. Having found an entity whether juristic or natural to be an instrumentality or agency of the State, it is not necessary to call it an 'authority'. It would make a substantial difference to find whether an entity is an instrumentality or agency or an authority. Secondly, *Ajay Hasia* was the case of a registered society; it was not an appropriate occasion for dealing with corporations or entities other than society. On the inferences drawn by reading of the Memorandum of Association of the society and rules framed thereunder, and subjecting such inferences to the tests laid down in the decision itself, it was found that the society was an instrumentality or agency of the State and on tearing the veil of society what was to be seen was the State itself though in disguise. It was not thereafter necessary to hold the society an 'authority' and proceed to record "that the society is an instrumentality or the agency of the State and the Central Government and it is an 'authority' within the meaning of Article 12", entirely obliterating, the dividing line between 'instrumentality or agency of the State' and 'other authorities'. This has been a source of confusion and misdirection in thought process as we propose to explain a little later. Thirdly, though six tests are laid down but there is no clear indication in the judgment

whether in order to hold a legal entity the State, all the tests must be answered positively and it is the cumulative effect of such positive answers which will solve the riddle or positive answer to one or two or more tests would be enough to find out a solution. It appears what the court wished was reaching a final decision on an overall view of the result of the tests. Compare this with what was said by Bhagwati, J. in *Ramanna's* case. We have already noticed that in *Ajay Hasia*, Bhagwati, J. has in his own words summarized the test laid down by him in *Ramanna's* case. In *Ramanna's* case he had said that the question whether a corporation is governmental instrumentality or agency would depend on a variety of factors which defy exhaustive enumeration and moreover even amongst these factors described in *Ramanna's* case "the Court will have to consider the cumulative effect of these various factors and arrive at its decision." "It is the aggregate or cumulative effect of all the relevant factors that is controlling".

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

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

The Court in *Som Parkash Rekhi v. Union of India and Anr.*, (supra), was posed with the question-whether Bharat Petroleum Corporation Ltd., a statutory corporation, was an 'authority', and therefore 'the State' under Article 12. Certain observations made by Krishna Iyer, J. are pertinent. To begin with, he said, "any authority under control of the Government of India comes within the definition." While dealing with the corporate personality, it has

A to be remembered that “while the formal ownership is cast in the corporate mould, the reality reaches down to State control”. The core fact is that the Central Government chooses to make over, for better management, its own property to its own offspring. A Government Company is a mini-incarnation of Government itself, made up of its blood and bones and given corporate shape and status for defined objectives and not beyond. The device is too obvious for deception. A Government Company though, is but the alter ego of the Central Government and tearing of the juristic veil worn, would bring out the true character of the entity being ‘the State’. Krishna Iyer, J. held it to be immaterial whether the Corporation is formed by a statute or under a statute, the true test is functional. “Not how the legal person is born but why it is created.” He further held that both the things are essential: (i) discharging functions or doing business as the proxy of the State by wearing the corporate mask, and (ii) an element of ability to affect legal relations by virtue of power vested in it by law. These tests, if answered in positive, would entail the Corporation being an instrumentality or agency of the State. What is an ‘authority’? Krishna Iyer, J. defined ‘authority’ as one which in law belongs to the province of power and the search here must be to see whether the Act vests authority, as agent or instrumentality of the State, to affect the legal relations of oneself or others. He quoted the definition of ‘authority’ from the Law Lexicon by P. Ramnath Iyer to say “Authority is a body having jurisdiction in certain matters of a public nature” and from Salmond’s Jurisprudence, to say that the “ability conferred upon a person by the law to alter, by his own will directed to that end, the rights, duties, liabilities or other legal relations, either of himself or of other persons,’ must be present ab extra to make a person an ‘authority’.” He held BPL to be “a limb of Government and agency of the State, a vicarious creature of statute”, because of these characteristics, which he found from the provisions of the Act which created it and other circumstances, viz., (i) it is not a mere company but much more than that, (ii) it has a statutory flavour in its operations and functions, in its powers and duties and in its personality itself, (iii) it is functionally and administratively under the thumb of Government; and (iv) the Company had stepped into the shoes of the executive power of the State and had unique protection, immunity and powers. In conclusion Krishna Iyer, J. held that the case of BPL was a close parallel to the Airport Authority’s case (*Ramanna’s case*) excepting that Airport Authority is created by a statute while BPL is recognized by and clothed with rights and duties by the statute. Krishna Iyer, J. having culled out the several tests from *Ramanna’s case* added a clinching footnote the finale is reached *when the cumulative effect of all the relevant factors* above set out is assessed and once the body is

found to be an instrumentality or agency of Government, the further conclusion emerges that it is 'the State' and is subject to the same constitutional limitations as Government and it is this divagation which explains the ratio of *Ramanna's* case

The three-Judges Bench in *The Workmen, Food Corporation of India v. Food Corporation of India*, [1985] 2 SCC 136, held Food Corporation of India to be an instrumentality of the State covered by the expression 'other authority' in Article 12. It was found : (i) FCI was set up under the Food Corporation Act, 1964 (ii) initial capital was provided by Central Government and capital could be increased in such manner as the government may determine; (iii) the Board of Directors in whom the management of the Corporation is to vest shall act according to instructions on question of policy given by the Central Government; (iv) the annual net profit of FCI is to be paid to the Central Government; (v) annual report of its working and affairs is to be laid before the Houses of Parliament; (vi) statutory power conferred to make rules and regulations for giving effect to the provisions of the parent act as also to provide for service matters relating to officers and employees.

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

What is 'Authority' and when includible in 'other authorities', re: Article 12

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

A reference to Article 13 (2) of the Constitution is apposite. It provides —“The State shall not make any law which takes away or abridges the right

- A** 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 Constituent Assembly explaining the purpose sought to be achieved by Article 12. In *RSEB's* case, the majority adopted the test that a statutory authority "would be within the meaning of 'other authorities' if it has been invested with statutory power to issue binding directions to the parties, disobedience of which would entail penal consequences or it has the sovereign power to make rules and regulations having the force of law". In *Sukhdev Singh's* case, the principal reason which prevailed with A.N. Ray, CJ for holding ONGC, LIC and IFC as authorities and hence 'the State' was that rules and regulations framed by them have the force of law. In *Sukhdev Singh's* case, Mathew J. held that the test laid down in *RSEB's* case was satisfied so far as ONGC is concerned but the same was not satisfied in the case of LIC and IFC and, therefore, he added to the list of tests laid down in *RSEB's* case, by observing that though there are no statutory provisions, so far as LIC and IFC are concerned, for issuing binding directions to third parties, the disobedience of which would entail penal consequences, yet these corporations (i) set up under statutes, (ii) to carry on business of public importance or which is fundamental to the life of the people—can be considered as the State within the meaning of Article 12.
- E** Thus, it is the functional test which was devised and utilized by Mathew J. and there he said, "the question for consideration is whether a public corporation set up under a special statute to carry on a business or service which Parliament thinks necessary to be carried on in the interest of the nation is an agency or instrumentality of the State and would be subject to the limitations expressed in Article 13 (2) of the Constitution. The State is an abstract entity. It can only act through the instrumentality or agency of natural or juridical persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State". It is pertinent to note that functional tests became necessary because of the State having chosen to entrust its own functions to an instrumentality or agency in absence whereof that function would have been a State activity on account of its public importance and being fundamental to the life of the people.

H The philosophy underlying the expansion of Article 12 of the Constitution so as to embrace within its ken such entities which would not otherwise be the State within the meaning of Article 12 of the Constitution.

has been pointed out by the eminent jurist H. M. Seervai in Constitutional Law of India (Silver Jubilee Edition, Vol. 1). "The Constitution should be so interpreted that the governing power, wherever located, must be subjected to fundamental constitutional limitations. Under Article 13 (2) it is State action of a particular kind that is prohibited. Individual invasion of individual rights is not, generally speaking, covered by Article 13 (2). For, although Articles 17, 23 and 24 show that fundamental rights can be violated by private individuals and relief against them would be available under Article 32, still, by and large, Article 13 (2) is directed against State action. A public corporation being the creation of the State, is subject to the same constitutional limitations as the State itself. Two conditions are necessary, namely, that the Corporation must be created by the State and it must invade the constitutional rights of individuals" (Para 7.54). "The line of reasoning developed by Mathew J. prevents a large-scale evasion of fundamental rights by transferring work done in Govt. Departments to statutory Corporations, whilst retaining Govt. control. Company legislation in India permits tearing of the corporate veil in certain cases and to look behind the real legal personality. But Mathew J. achieved the same result by a different route, namely, by drawing out the implications of Article 13 (2) " (Para 7. 57 *ibid*).

The terms instrumentality or agency of the State are not to be found mentioned in Article 12 of the Constitution. Nevertheless they fall within the ken of Article 12 of the Constitution for the simple reason that if the State chooses to set up an instrumentality or agency and entrusts it with the same power, function or action which would otherwise have been exercised or undertaken by itself, there is no reason why such instrumentality or agency should not be subject to same constitutional and public law limitations as the State would have been. In different judicial pronouncements, some of which we have reviewed, any company, corporation, society or any other entity having a juridical existence if it has been held to be an instrumentality or agency of the State, it has been so held only on having found to be an alter ego, a double or a proxy or a limb or an off-spring or a mini-incarnation or a vicarious creature or a surrogate and so on — by whatever name called— of the State. In short, the material available must justify holding of the entity wearing a mask or a veil worn only legally and outwardly which on piercing fails to obliterate the true character of the State in disguise. Then it is an instrumentality or agency of the State.

It is this basic and essential distinction between an 'instrumentality or agency' of the State and 'other authorities' which has to be borne in mind.

A An authority must be an authority *sui juris* to fall within the meaning of the expression 'other authorities' under Article 12. A juridical entity, though an authority, may also satisfy the test of being an instrumentality or agency of the State in which event such authority may be held to be an instrumentality or agency of the State but not the vice versa.

B We sum up our conclusions as under:-

- C** (1) Simply by holding a legal entity to be an instrumentality or agency of the State it does not necessarily become an authority within the meaning of 'other authorities' in Article 12. To be an authority, the entity should have been created by a statute or under a statute and functioning with liability and obligations to public. Further, the statute creating the entity should have vested that entity with power to make law or issue binding directions amounting to law within the meaning of Article 13 (2) governing its relationship with other people or the affairs of other people — their rights, duties, liabilities or other legal relations. If created under a statute, then there must exist some other statute conferring on the entity such powers. In either case, it should have been entrusted with such functions as are governmental or closely associated therewith by being of public importance or being fundamental to the life of the people and hence governmental. Such authority would be the State, for, one who enjoys the powers or privileges of the State must also be subjected to limitations and obligations of the State. It is this strong statutory flavour and clear indicia of power — constitutional or statutory, and its potential or capability to act to the detriment of fundamental rights of the people, which makes it an authority; though in a given case, depending on the facts and circumstances, an authority may also be found to be an instrumentality or agency of the State and to that extent they may overlap. Tests 1, 2 and 4 in *Ajay Hasia* enable determination of Governmental ownership or control. Tests 3, 5 and 6 are 'functional' tests. The propounder of the tests himself has used the words suggesting relevancy of those tests for finding out if an entity was instrumentality or agency of the State. Unfortunately thereafter the tests were considered relevant for testing if an authority is the State and this fallacy has occurred because of difference between 'instrumentality and agency' of the State and an 'authority' having been lost sight of sub-silentio, unconsciously

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and un-deliberated. In our opinion, and keeping in view the meaning which 'authority' carries, the question whether an entity is an 'authority' cannot be answered by applying *Ajay Hasia* tests.

- (2) The tests laid down in *Ajay Hasia's* case are relevant for the purpose of determining whether an entity is an instrumentality or agency of the State. Neither all the tests are required to be answered in positive nor a positive answer to one or two tests would suffice. It will depend upon a combination of one or more of the relevant factors depending upon the essentiality and overwhelming nature of such factors in identifying the real source of governing power, if need be by removing the mask or piercing the veil disguising the entity concerned. When an entity has an independent legal existence, before it is held to be the State, the person alleging it to be so must satisfy the Court of brooding presence of government or deep and pervasive control of the government so as to hold it to be an instrumentality or agency of the State.

CSIR, if 'the State'?

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

We may now examine the characteristics of CSIR. On a careful examination of the material available consisting of the memorandum of association, rules and regulations and bye-laws of the society and its budget and statement of receipts and outgoings, we proceed to record our conclusions: The Government does not hold the entire share capital of CSIR. It is not owned by the Government. Presently, the Government funding is about 70% and grant by Government of India is one out of five categories of avenues to derive its funds. Receipts from other sources such as research, development, consultation activities, monies received for specific projects and job work, assets of the society, gifts and donations are permissible sources of funding of CSIR without any prior permission/consent/sanction from the Government of India. Financial assistance from the Government does not meet almost all

- A** expenditure of the CSIR and apparently it fluctuates too depending upon variation from its own sources of income. It does not enjoy any monopoly status, much less conferred or protected by Government. The governing body does not consist entirely of Government nominees. The membership of the society and the manning of its governing body - both consist substantially of private individuals of eminence and independence who cannot be regarded as hands and voice of the State. There is no provision in the rules or the 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 the CSIR cannot be regarded as governmental or of essential public importance or as closely related to governmental functions or being fundamental to the life of the people or duties and obligations to public at large. The functions entrusted to CSIR can as well be carried out by any private person or organization. Historically it was not a department of government which was transferred to CSIR. There was a Board of Scientific and Industrial Research and an Industrial Research Utilisation Committee. The CSIR was set up as a society registered under the Societies Registration Act, 1860 to coordinate and generally exercise administrative control over the two organizations which would tender their advice only to CSIR. The membership of the society and the governing body of the council may be terminated by the President not by the Government of India. The governing body is headed by the Director General of CSIR and not by the President of Society (i.e. the Prime Minister). Certainly the board and the committee, taken over by CSIR, did not discharge any regal, governmental or sovereign functions. The CSIR is not the offspring or the blood and bones or the voice and hands of the government. The CSIR does not and cannot make law.

However, the Prime Minister of India is the President of the society.

- F** Some of the members of the society and of the governing body are persons appointed ex-officio by virtue of their holding some office under the Government also. There is some element of control exercised by the government in matters of expenditure such as on the quantum and extent of expenditure more for the reason that financial assistance is also granted by the Government of India and the later wishes to see that its money is properly used and not misused. The President is empowered to review, amend and vary any of the decisions of the governing body which is in the nature of residual power for taking corrective measures vesting in the President but then the power is in the President in that capacity and not as Prime Minister of India. On winding up or dissolution of CSIR any remaining property is not available to members but 'shall be dealt with in such manner as Government

of India may determine'. There is nothing special about such a provision in Memorandum of Association of CSIR as such a provision is a general one applicable to all societies under Section 14 of the Societies Registration Act, 1860. True that there is some element of control of the government but not a deep and pervasive control. To some extent, it may be said that Government's presence or participation is felt in the society but such presence cannot be called a brooding presence or the overlordship of government. We are satisfied that the tests in *Ajay Hasia's* case are not substantially or on essential aspects even satisfied to call CSIR an instrumentality or agency of the State. A mere governmental patronage, encouragement, push or recognition would not make an entity 'the State'.

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

Strong reliance was placed by the learned counsel for the appellants on a notification dated 31. 10. 1986 issued in exercise of the powers conferred by sub-Section (2) of Section 14 of the Administrative Tribunals Act, 1985 whereby the provisions of sub-Section (3) of Section 14 of the said Act have been made applicable to the Council of Scientific and Industrial Research, "being the society owned or controlled by government". On point of fact we may state that this notification, though of the year 1986, was not relied on or referred to in the pleadings of the appellants. We do not find it mentioned anywhere in the proceedings before the High Court and not even in the SLP filed in this Court. Just during the course of hearing this notification was taken out from his brief by the learned counsel and shown to the Court and the opposite counsel. It was almost sprung as a surprise without affording the opposite party an opportunity of giving an explanation. The learned Attorney General pointed out that the notification was issued by Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training) and he appealed to the Court not to overlook the practical side in the working of the government where at times one department does not know what the other department is doing. We do not propose to enter into a deeper scrutiny of the notification. For our purpose, it would suffice to say that Section 14 of the Administrative Tribunals Act, 1985, and Article 323A of the Constitution to which the Act owes its origin, do not apparently contemplate a society being

- A** brought within the ambit of the Act by a notification of Central Government. Though, we guardedly abstain from expressing any opinion on this issue as the present one cannot be an occasion for entering into that exercise. Moreover, on the material available, we have recorded a positive finding that CSIR is not a society "owned or controlled by Government". We cannot ignore that finding solely by relying on the contents of the notification wherein we find
- B** the user of relevant expression having been mechanically copied but factually unsupportable.

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

K.K.T.

Appeal dismissed.