

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: July 09, 2021

+ W.P.(C) 4733/2021 & CM. NO. 14602/2021

JITARANI UDGATA

..... Petitioner

Through: Petitioner in person.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Vivekanand Mishra, Sr. Panel
Counsel for UOI
Mr. Aman Raj Gandhi, Mr. Abhirath
Thakur and Mr. Pranav Saigal, Advs.
for R-2

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This petition has been filed by the petitioner with the following prayers:

“In the said premises it is most respectfully prayed that Honorable Court may be graciously pleased to pass an order/direction including a suitable WRIT in the nature of MANDAMUS towards undoing the negativity and the disproportionality of the impugned Order of Termination dated 13th Oct, 2020 thereby calling for the whole gamut of the records from, the Respondents while further deeming the petitioner to be in continuous service as from the date of impugned Termination with retrospective effect thereby further directing the respondents to release the illegal withhold financial dues plus the heavy damages without holding any inquiry contra to the legal niceties eventually setting aside the letter of termination in question as illegal and NONEST in the eyes of law pass

any other order as this Honorable Court deems fit and proper to meet ends of justice.

Said petitioner is a lady in person prosecuting her case from a distance place like Berhampur in Odisha the matter on hand deserves to be placed before the Honorable Court subject to discretion of the Court on merits having regard to the justiciability and the location of Respondent no.1 Ministry of Commerce and Industry (MoCI) under which authority Respondent no.2 Sabyasachi Ray is functioning subject to the administrative and financial control. Thus, this Court has got territorial jurisdiction to adjudication the subject.”

2. On April 16, 2021 when this matter was first listed, this Court raised an issue on the maintainability of this petition against respondent No.2 i.e., The Gem and Jewellery Export Promotional Council (‘GJEPC’ for short). Additionally, this Court directed the respondent No.1 to file an affidavit, clarifying the position/status of respondent No.2 as an entity being financed and controlled by respondent No.1 or not. An affidavit dated May 30, 2021 has been filed vide Diary No. 391834/2021 by respondent No.1, along with an application seeking exemption from filing affirmed affidavit, the said application is allowed and the affidavit is taken on record.

3. The Petitioner has also filed her response on the issue of maintainability vide Diary No. 392605 and is accompanied with an application for condoning delay. The application is allowed and the response is taken on record.

4. It is the case of the petitioner who appears in person, that GJEPC functions under the sponsorship of the Ministry of

Commerce and Industry ('MOCI' for short) and the said Ministry has effective and all pervasive control over the GJEPC. Respondent No.2 is an instrumentality of State within Article 12 of the Constitution due to the extent of the regulation, control and supervision that the MOCI exercises over respondent No. 2. According to her, respondent No.2 is substantially financed through the MOCI and the main objective of the former is to work towards promotion of export of gems and jewellery. She has referred to a screenshot of the website of MOCI wherein the GJEPC finds mention under the category of Export Promotion Councils. She relies on a text which is also available on the MOCI website in support of her arguments, which reads as under:

"EP(G&J) Section deals with promotion of exports of Gems & Jewellery (G&J) products as well as appraisal of imports of commodities relating to gems & jewellery sector The Section also handles administrative matters concerning Gem & Jewellery Export Promotion Council (GJEPC) and Indian Diamond Institute (IDI). In addition, EP(G&J) Section is the nodal point for implementation of Kimberley Process Certification Scheme (KPCS) and also focuses on issues pertaining to domestic gems & jewellery industry."

Based on this text, she states, (the governmental character of respondent No.2) is established in the matter of regulation and control. Additionally, the policy framework attracts provisions of Article 12 of the Constitution.

5. It is her case that in a reply dated February 09, 2021 to an RTI application by the Department of Commerce, it is revealed

that there is a substantial degree of control and regulation over the trading activities of GJEPC by the respondent No.1. She argues that as the range of activities in which respondent No.2 deals with, are in the realm of trade and commerce, a subject which belongs in the Union List. The field in which GJEPC operates involves greater financial/economic aspects for generation of revenue in the process of export of commodities. This aspect coupled with the reply to the RTI application proves the substantial degree of control.

6. It is her case that, even the recruitment and appointment procedure contains similar conditions of service which conform with Article 311 of the Constitution. She states that although her appointment letter does not mention the applicability of CCS Rules but the same are echoed in the terms of employment.

7. The Petitioner argues that various decisions of the Supreme Court and the High Court have determined the following factors for ascertaining whether an organisation falls within the definition of “*State*” under Article 12 of the Constitution;

- A. Origin of the Company;
- B. Share Capital, whether owned by the government in entirety;
- C. Nature of Business and whether there is a monopoly status;
- D. Public Nature and function of the entity being of public importance related to government functions, whether

government department may be transferred to the corporation;

E. Financial aid, whether it meets almost the entire expenditure and;

F. Deep and pervasive control of the government.

8. She argues that the GJEPC satisfies these tests, since the GJEPC was set up with the active patronage of the of the Department of Commerce, in order to augment international trade policy, formation of various export councils under the administrative control of the department was encouraged. These bodies were registered as a non-profit organisation under the Companies Act, 1956 or the Societies Registration Act 1860. These Councils also functioned as a registering authority for exporters under the Foreign Trade Department of the Government. According to her, GJEPC is discharging a public duty on behalf of the Union of India to espouse the cause of export promotion abroad and earning foreign exchange for the country and facilitate around 7,000 members in foreign trading of gem and jewellery items. She argues that the GJEPC has an established monopoly in the business as it is the only government agency for Kimberley Process Certification, which is mandatory for import and export of rough diamonds, however in the other countries the Kimberley Process authority is the Customs department of that country. In this regard she relies on notification no. 34/2015-2020 dated 28 September, 2020, issued by Govt. of India (Ministry of Commerce & Industry, DOC, DGFT). She states that this GJEPC is the only authorised body

of its kind in the field of jewellery and gemstone export and hence enjoys a monopoly in business. Furthermore, according to Clause 48 of the Articles of Association ('AoA' for short), any alteration to the Memorandum of Association ('MoA' hereafter) or the AoA shall not be carried out without the approval of the Central Government. Even the Balance Sheet, Annual Report, along with the Audit and Accounts report are reviewed in both the Houses of Parliament, which also looks into the working of the GJEPC. She stated that the Central Government has from time to time supervised the export promotion activities conducted through GJEPC. This factum according to her proves the deep and pervasive control of the government. Further reliance has been placed by her on Clause 9.2 of the MoA and Clauses 2.1, 33.5, 33.9, 44.1, 47.1-3, 48, 49 and 51 of the AoA. Additionally, various government notifications issued on various dates prove the fact that GJEPC has the characteristics of a government body which discharges public duties by generating revenue in the form of foreign exchange and strengthening the exchequer.

9. Mr. Vivekanand Mishra learned Counsel appears along with Mr. Aman Raj Gandhi on behalf of respondent No.2 and has at the very outset argued that the parameters essential for respondent No.2 to be declared as an entity within the meaning of "*State*" under Article 12 of the Constitution have not been met. He states that GJEPC is not a statutory body but rather a company incorporated under Section 25 of the Companies Act, 1956 (Section 8 of the Companies Act, 2013). The respondent No.2 has a voluntary membership and is not under statutory

control. He also argued that the respondent No.2 neither possesses any powers to make laws nor issue binding directions amounting to law which govern its relationship with public or the affairs of public, their rights, duties, liabilities and / or other legal relations as being a necessary precondition under Article 13 of the Constitution. Even the functions performed by the respondent No.2 do not fall within the purview of sovereign functions of the State and as per the MoA the object of respondent No.2 is to support, protect, maintain and increase exports of gems and jewellery; a function which may be important, but cannot be dubbed as a government function. Respondent No.2 has never been a department under respondent No.1 and does not trace its incorporation as under or subordinate to Respondent No.1. Neither does respondent No.1 own GJEPC nor does it exercise administrative control over it. A submission has also been made that the functions performed by respondent No.2 can be performed by any other private person or organisation, and to that extent the respondent No.2 does not have a monopoly on these activities.

10. Mr. Mishra submits that the respondent No.2 was constituted by eight persons, all of whom were jewellers by occupation and as of March 31, 2021 the membership of GJEPC has increased to 6506 members, none of whom are representatives of respondent No.1. The Committee of Administration which manages the GJEPC is controlled by the members who are neither appointed, nor nominated by respondent No.1; and respondent No.1 does not have a say in the

appointment of the Chairman. Upon examination of the AoA it would reveal that this Committee of Administration has maximum of 24 members and that the members nominated by the Government cannot exceed three in number. These nominated members have no voting rights and therefore cannot participate in the decision making process of the Committee hence act as advisors in the administration of GJEPC.

11. According to Mr. Mishra, it is this Administrative Committee that looks after the general day to day affairs of the respondent No.2 i.e., controlling the finances, staff appointments, renewal, cancellation, suspension and termination of its members. The Administrative Committee is empowered to make rules in relation to the conditions of service, appointment, promotions, dismissal, etc., as per the clause 33.4 of the AoA. With regard to the funding of GJEPC, Mr. Mishra stated that the primary source of funds is the membership subscription and that these funds are sufficient for the independent and proper functioning of GJEPC. He states that there is no funding provided by the respondent No.1 to GJEPC with respect to salaries of the employees or any other funding of administrative nature or funds which are required for its day to day affairs.

12. The only funding received by the respondent No.2 from respondent No.1 is conditional and only when GJEPC makes an application to the respondent No.1 for a particular project, funds are provided to it. The Schemes for granting funds are notified on the website of respondent No.1 and are open for all. The funds are received for certain specific export promotion activities under

the Market Access Initiative Scheme (“MAI scheme” for short) and Market Development Assistance Scheme (“MDA scheme” for short”). If these funds are sanctioned the same are used for the aforementioned specific schemes and no portion is utilised for any other activity beyond the said scheme. The funds / grants received from respondent No.1 do not meet any major expenses incurred by respondent No.2 and to that extent the grants received from Respondent No.1 are not substantial when compared to the total revenue generated by GJEPC. Mr. Mishra states that according to the EXIM Policy 1997-2002 formulated by the MOCI, all Export Promotion Councils, including GJEPC were granted an autonomous status, this status is further bolstered by the fact that the earnings from the aforesaid sources do not require prior consent or sanction from respondent No.1. Mr. Mishra has submitted figures (reproduced below) of the revenue generated by GJEPC over the past 22 years and compared it with the grants (revenue grants and capital grants) received from respondent No.1 to show that at any given point in time the grant given by respondent No.1 did not exceed 27%.

Sl. No.	Financial Year	Grants Utilized (In Rs.)	Total Revenue Generated By Respondent No.2 (In Rs.)	Percentage	Number Of Events
1	1999-2000	1,31,10,000	9,48,07,901	14%	-
2	2000-2001	1,99,32,000	11,04,78,755	18%	-
3	2001-2002	2,56,10,797	9,85,03,210	26%	-
4	2002-2003	4,12,33,000	15,31,45,508	27%	-
5	2003-2004	70,62,736	19,42,30,018	4%	-
6	2004-2005	1,18,64,715	38,60,10,682	3%	13

7	2005-2006	4,43,38,272	56,20,47,381	8%	14
8	2006-2007	5,96,38,158	52,60,60,434	11%	27
9	2007-2008	4,34,90,333	62,59,52,184	7%	19
10	2008-2009	4,90,76,198	64,19,30,504	8%	18
11	2009-2010	8,79,24,021	74,10,43,814	12%	19
12	2010-2011	16,68,50,383	1,00,57,19,583	17%	19
13	2011-2012	15,96,40,676	1,16,02,21,023	14%	21
14	2012-2013	18,45,13,123	1,31,73,17,085	14%	16
15	2013-2014	13,78,67,008	1,54,62,33,886	9%	20
16	2014-2015	13,85,04,199	1,47,90,52,211	9%	18
17	2015-2016	9,18,63,610	1,53,32,49,012	6%	7
18	2016-2017	9,43,44,476	1,39,20,95,171	7%	10
19	2017-2018	18,52,12,386	1,66,54,04,113	11%	10
20	2018-2019	19,77,68,986	1,97,82,92,859	10%	12
21	2019-2020	12,45,92,533	1,82,17,71,879	7%	12
22	2020-2021*	5,45,17,500	31,06,80,160	18%	11

*unaudited figures subject to change

13. Mr. Mishra places reliance on the judgement of the Rajasthan High Court in the case of ***Raj Rajeshwar Dadhich vs. The Gem & Jewellery Export Promotion Council and Anr. 1992 SCC Online Raj 202***, to argue that the government has a very limited role to play in the functioning of respondent No.2. He points to the MoA which gives out the ancillary objects which are to advise and represent the government and the public bodies on the matters of policy and on matters relating to contravention of codes of practice. These objects he states have remained unmodified even prior to the aforesaid judgement. However over

time role and power of the government in respondent No.2 has decreased in the following manner:-

- I. Apart from clauses 5, 25 and 66 of the earlier AoA the remaining clauses referred to by the judgement of ***Raj Rajeshwar Dadhich (supra)*** have been retained in spirit.
- II. Clause 5 of the earlier AoA stated that all rights and privileges of the members shall be laid down in the bye-laws as framed by the Working Committee. The express power to frame bye-laws has been done away with and the rights and privileges of the members have been set out in the AoA itself and that there is no involvement of the Government.
- III. Clause 25 which used to state that the Secretary shall not be a member of the GJEPC and would be employed as a full time paid officer whose appointment would've been approved by the Government. However the current AoA the approval of the government for the appointment of the secretary has been done away with and the secretary has been made a part of the respondent No.2 council.
- IV. Clause 66 of the earlier AoA, stated that the budget was required to be sanctioned by the Working Committee in consultation with the government. This consultation, as per the current AoA is not required, as the Audit & Finance Sub-Committee has been

constituted for presenting the budget and obtaining the approval of the Committee.

14. Mr. Mishra has also placed reliance on an order dated March 28, 2014 of this Court in the case of ***Bharat Bhushan v. Union of India and Ors. W.P. (C) 1199/2014*** wherein the petition was withdrawn with the liberty to the petitioner to approach the appropriate forum. He further argues that the documents upon which the petitioner has placed reliance also demonstrate that GJEPC is not an instrumentality of State since:

- a) The compilation of documents filed by the Petitioner are certain pages from the website of the MOCI, merely listing out the names of various export promotion councils and their organisational set up and functions, such as them being registered under the Companies Act, 1956 or the Societies Registration Act 1860, them being non-profit organisations. This does not demonstrate GJEPC as being an instrumentality of the State.
- b) The officer who is in charge of handling public/staff grievance in the respondent No.2 is an employee of the said respondent and not a government nominee on the Administrative Committee. The fact that all public/staff grievances are handled internally and that too, without any external support makes it evident that respondent No.2 is not governed by respondent No.1 and is an autonomous body.

- c) The Exim Policy 1997-2002, formulated by the MOCI, all export promotion councils including the GJEPC have been granted autonomous status by MOCI.
- d) The reply in the RTI application dated February 09, 2021 merely discloses that GJEPC participated in the Kimberley Process Certification Scheme in the capacity of a designated Importing and Exporting Authority. A perusal of the said reply does not suggest either expressly or impliedly that GJEPC is an instrumentality of the State.

15. Mr. Mishra contends that respondent No.2 is neither a body financially, functionally, administratively dominated by or under the control of the government nor is this control peculiar or pervasive in the case of GJEPC. Even if it were to be assumed that respondent No.1 is able to exercise control on GJEPC, even then such control by no stretch, is deep or pervasive for respondent No.2 to qualify as State. According to him, the grievance of the Petitioner with regard to her termination of employment is a purely private service dispute with GJEPC. The service conditions of the petition are not laid down by any statute nor are the employees carrying out any statutory functions. The present dispute has no public law character, nor is it a dispute arising in the course of discharge of any public function or public duty by respondent No.2 and it is for these reasons that the present petition is not maintainable. In this regard he has relied upon the following judgments:-

- i. ***Rotary Club Birla Nagar v. Rotary General, 2013 (4) MPLJ 185***

- ii. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology & Ors, (2002) 5 SCC 111*
- iii. *Chander Mohan Khanna v. National Council of Education Research Training & Co, (1991) 4 SCC 578*

16. Mr. Mishra has drawn my attention to the affidavit filed on behalf of respondent No.1 wherein it has been stated that the respondent No.2 is an autonomous body and that the Department of Commerce exercises no control over it and has no say or concern in the day to day functioning of GJEPC including issues related to its employees. The only power which the government has is enumerated in clause 47 of the AoA, i.e., power to give directions:

- i. in the interest of national security or;
- ii. in the interest of the national economy or;
- iii. in cases of public interest.

With regard to finances the affidavit states that the Department of Commerce provides funding under the various schemes such as MAI, Trade Infrastructure for Export Scheme (TIES), scheme for setting up Common Facility Centres for Gems and Jewellery Sector, etc. The funding provided by the Department of Commerce is scheme specific funding and no financial assistance is given by the Department of Commerce to the GJEPC for running routine business or for their administrative functions. Respondent No.1 states that it is not a proper or a necessary party in the present proceedings.

17. According to the petitioner the objectives of GJEPC are promoting Brand India, connecting government and trade,

upholding diamond integrity, spreading education and providing health insurance for its employees. GJEPC has been created by MOCI like the other 13 Export Promotion Councils (mentioned on the website of the Department of Commerce), which discharge the responsibilities including technical assistance on behalf of the government as a form of public service even though GJEPC has been incorporated as company. The power of declaring an Export Promotion Council as defunct lies with the government alone. No private body can be listed on a government website, which is not the case with GJEPC. She argues that Courts have declared other Export Promotion Councils as “*state*” within the meaning of Article 12 such as the Leather Council, Apparel Council and CAPEXIL; on a similar basis GJEPC should also be treated at par with the other Export Promotion Councils.

18. It is her case that various clauses in the AoA clarify that said Council is under deep and pervasive control of the State. She has referred to Articles 33.5, 39.3, 44.1, 47.1, 47.2, 47.3, 48, 49 and 51. The GJEPC is meant for public duty and bound to work only for public interest under the financial, functional and administrative control of the Central Government. To substantiate her claim, she argues that GJEPC can deposit or invest monies and securities in any banks approved, on its behalf by the Union Government. Thus the company has no choice in selection of a Bank of its own choice. The government also appoints three officials in the board of management and the government also gives financial assistance

to various projects of GJEPC and retains full control and supervision over the utilisation of the funds. Government auditors are deputed by the Department of Commerce to verify the utilisation of the government grants under various schemes such as the MDA, MAI, ASIDE, etc. She states that inspection teams are also sent routinely by the government for checking the progress of various export promotion activities under the MDA and MAI schemes; however the benefits of these schemes are received only by the registered members of the GJEPC. As per clause 33.5 of the AoA, GJEPC has to spend 50% of its revenue except for government aid for the benefit of the Public, in this case the exporters; and this would show that GJEPC is ultimately involved in public service.

19. The Petitioner argues that the Annual Report of the GJEPC giving details of the revenue, performance accountability along with the Audit and Accounts Report is reviewed by the Parliament. She has argued that the respondent No.2 is an instrumentality of the State and in these proceedings is trying to portray itself as a corporate entity whereas its functioning shows that it is a State instrumentality. This is also made clear by the fact that there is regular government intervention in many fields including audits and accounts.

20. As per clause 9.2 of the MoA if the respondent No.2 was to fail in holding timely elections, the clause allows for government intervention. Clause 3.3 of the AoA provides for the admission of an associate member upon getting an Import-export code number from the Director General of Foreign

Trade. According to the petitioner government notification No. 12/8/2007-E&MDA dated February 22, 2012 is evidence that GJEPC does not have any liberty or authority to conduct elections for the Administrative Committee, since the GJEPC is bound to follow the rules prescribed by the MOCI. Members who are on the Denied Entity List of the Directorate General of Foreign Trade would not be considered for the position within the Administrative Committee. Such a member cannot even cast a vote since the membership registration for that company would lapse based on the data generated by Directorate General of Foreign Trade. Based on the above, she states, GJEPC cannot be classified as an independent entity.

21. She states that the membership fee from which GJEPC now claims to earn revenue from, is a recent phenomenon as earlier it was known as user fees, a fee which was introduced as a result of the changes in Fiscal Policies post 1991. Even though the GJEPC may earn revenues, as per clause 33.5 of the AoA, it has to spend at least 50% of the internal resources are to be used for development activities. She has argued that the judgment in ***Raj Rajeshwar Dadhich (supra)*** is not applicable to the present case as, the petitioner in that case had not completed 240 days of service and was not entitled to the benefit of the provisions contained in the Industrial Disputes Act, 1947. Similarly, the case of ***Bharat Bhushan (supra)*** should not be relied on with regard to the issue at hand since that petition had been withdrawn by the petitioner therein and the issue was not decided on merits.

22. She has relied on the judgement of the Calcutta High Court in the case of *Sunirmal Kumar Roy vs. Union of India & Ors. (2007) 5 SLR 186 (Cal) (DB)* to state that a similarly placed Export Promotion Council i.e, Chemical and Allied Products Export Promotion Council ('CAPEXIL', for short) was held to be within the definition of "State" under Article 12 of the Constitution. Therefore she stated that in light of the judgement in the case of *Ramanna Dayaram Shetty Vs. The International Airport Authority of India & Ors. (1979) 3 SCC 489* the cases of *Rotary Club Birla Nagar (supra)* and *Chander Mohan Khanna(supra)* are not applicable to the present case. In support of her case she has relied on the following case laws:-

- i. *All India Garment Exporters Common Cause Guild And Ors. v. Union Of India & ANR, W.P.(C) 5093/1998 dated January 18, 2011*
- ii. *Council for Leather Exports v. Commissioner of Income Tax (Appeals), 2018 SCC OnLine Mad 1030.*
- iii. *A.R. Abdul Gaffar v. Union Of India & Ors. ILR (2013) 1 Del 494*
- iv. *Zee Telefilms Limited v. Union of India (2005) 4 SCC 649*
- v. *Sukhdev Singh and Ors. v. Bhagatram Sardar Singh Raghuvanshi and Ors. (1975) 1 SCC 421*

vi. ***BCCI Vs. Cricket Association of Bihar and Ors., (2015)***
3 SCC 251

vii. ***Meenakshi Patel & Others v. Engineering Export
Promotion Council & Others 2001 SCC Online Bom
610.***

viii. ***Pradeep Kumar Biswas (supra)***

23. The Petitioner also argues that the respondent No.1 is a necessary party to these proceedings due to the position existing under clauses 47 and 48 of the AoA. She has also placed reliance on the Notification No. 34/2015-2020 issued by the respondent No.1 wherein GJEPC emerges as a key player in performing public duty. She states that the power to issue directions to GJEPC in cases concerning the national economy makes respondent a necessary party and contends that the above-mentioned arguments would apply in the case of respondent No1, since GJEPC is carrying out public functions on behalf of the respondent No.1.

24. The petitioner has filed a rejoinder vide diary number 404794 as on July 06, 2021. Wherein she alleges that the termination letter dated October 13, 2020 through which her services were terminated ought to have been signed by the appointing authority which is not the case here since the termination letter has been signed by Dharmesh Shah, Assistant Director, HR & Admin. The same has also not placed any letter of authorization on record to show that he had the authority to sign the said letter. She alleges that being a permanent employee,

she was not given notice and the procedure adopted was not transparent or fair. She argues that permanent employees enjoy a lien on their posts, hence cannot be terminated without assigning any reasons and following due procedure established by law. She states that the decision was taken by the higher authorities and the termination letter was ultimately issued by an authority inferior to the appointing authority. In this regard she relied on the Apex Court judgment in ***Delhi Transport Corporation v. DTC Mazdoor Congress & Ors. (1991) Supp 1 SCC 600.***

25. She has cited the case of ***Kumari Shrilekha Vidyarthi & Ors. v. State of UP & Ors. (1991) 1 SCC 212*** to state that termination which is arbitrary, if involves a public element in appointment, would be subject to judicial review under Article 226 of the Constitution. It is her case that she not being a private employee and her service conditions are governed by the General Service Rules, 2011 which are similar to those applicable to government employees. Since, GJEPC does not function like a private organization and is a body sponsored under the MOCI.

26. A reference has been made to the consolidated financial statements for the financial year ending March 31, 2018 to state that the organization has made significant growth during her tenure and that she has contributed towards the same as well. On the aspect of dues that remain payable to her she states, that her case based on the various case laws would show that she has not been paid her financial dues which have been illegally held back by the respondent No.2. She states that her service record is unblemished and her claim to Rs. 2 crores which are due to her

have been withheld by the respondent No.2. She relies on a judgment of a Coordinate Bench of this Court in ***Robin Sharma vs. Apparel Training and Design WP (C) 4288/2020 decided on February 10, 2021*** to state that she should be reinstated and be compensated with damages along with her financial dues. She states that GJEPC has acted in contravention to the said judgment and terminated the petitioner without holding an inquiry, wherein she has not been accorded an opportunity of being heard. She raises allegations of *malafide* on Sabyasachi Ray who is the Executive Director of the respondent No.2 to state that the letter of termination was issued arbitrarily and with vested interest. She has placed reliance on the following judgments in support of her arguments.

- i. ***D.A.V. College Trust And Management Society & Ors. v. Director of Public Instructions & Ors. (2019) 9 SCC 185;***
- ii. ***Jayantibhai Raojibhai Patel v. Municipal Council, Narkhed & Ors. (2019) 17 SCC 184;***
- iii. ***Kalyanasundara Nadar and Anr. v. Muthuraman 1967 SCC Online Mad 380.***

27. Having heard the petitioner and the learned counsel for the respondent and perused the submissions made by them as well as the records, a question of maintainability arises; i.e., whether the respondent No.2 GJEPC falls under the definition of 'other Authority' within Article 12 of the Constitution of India.

28. Before I consider the submissions made by the petitioner and the learned counsel for the respondents, it is necessary to

refer to the position of law, as held by the Supreme Court in its various judgments.

29. In *Ajay Hasia & Ors. v. Khalid Mujib Sehravardi & Ors. (1981)1 SCC 722*, the Supreme Court has culled out the following six tests from its earlier judgment in the case of *Ramanna Dayaram Shetty v. The International Airport Authority of India and ors (supra):-*

(A) 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.

(B) 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.

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

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

(E) 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.

(F) 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.

30. The Supreme Court in a subsequent Judgment, speaking through seven Hon'ble Judges in ***Pradeep Kumar Biswas (supra)***, has in para 40 held as under:-

“40. 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 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.”

31. In ***K.K. Saxena v. International Commission on Irrigation and Drainage & Ors. (2015) 4 SCC 670***, the Supreme Court considering a similar issue, has held as under:-

“32.If the authority/body can be treated as a 'State' within the meaning of Article 12 of the Constitution of India, indubitably a writ petition under Article 226 would be maintainable against such an authority/body for enforcement of fundamental and other rights. Article 12 appears in Part III of the Constitution, which pertains to 'Fundamental Rights'. Therefore, the definition contained in Article 12 is for the purpose of application of the provisions contained in Part III. Article 226 of the Constitution, which deals with powers of High Courts to issue certain writs, inter alia, stipulates that every High Court has the power to issue directions, orders or writs to any person or authority, including, in appropriate cases,

any Government, for the enforcement of any of the rights conferred by Part III and for any other purpose.

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

*34. In this context, the first question which arises is as to what meaning is to be assigned to the expression 'any person or authority'. By catena of judgments rendered by this Court, it now stands well grounded that the term 'authority' used in Article 226 has to receive wider meaning than the same very term used in Article 12 of the Constitution. This was so held in *Andi Mukta Sadguru Shree Muktajee Vandas Swami Suvarna Jayanti**

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

35. The discussion which is relevant for our purposes is contained in paras 15 to 20. However, we would like to reproduce paras 15, 17 and 20, which read as under:

"15. If the rights are purely of a private character no mandamus can issue. If the management of the college is purely a private body with no public duty mandamus will not lie. These are two exceptions to Mandamus. But once these are absent and when the party has no other equally convenient remedy, mandamus cannot be denied. It has to be appreciated that the appellants-trust was managing the affiliated college to which public money is paid as government aid. Public money paid as government aid plays a major role in the control, maintenance and working of educational institutions. The aided institutions like government institutions discharge public function by way of

imparting education to students. They are subject to the rules and regulations of the affiliating university. Their activities are closely supervised by the University authorities. Employment in such institutions, therefore, is not devoid of any public character. So are the service conditions of the academic staff. When the University takes a decision regarding their pay scales, it will be binding on the management. The service conditions of the academic staff are, therefore, not purely of a private character. It has super-added protection by University decisions creating a legal right-duty relationship between the staff and the management. When there is existence of this relationship, mandamus cannot be refused to the aggrieved party.

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17. There, however, the prerogative writ of mandamus is confined only to public authorities to compel performance of public duty. The 'public authority' for them means every body which is created by statute - and whose powers and duties are defined by statute. So government departments, local authorities, police authorities, and statutory undertakings and corporations, are all 'public authorities';. But there is no such limitation for our High Courts to issue the writ 'in the nature of mandamus'. Article 226 confers wide powers on the High Courts to issue writs in the nature of prerogative writs. This is a striking departure from the English law. Under Article 226, writs can be issued to 'any person or authority'. It can be issued 'for the enforcement of any of the fundamental rights and for any other purpose'.

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

or authority' used in Article 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party. No matter by what means the duty is imposed. If a positive obligation exists mandamus cannot be denied."

36. In para 15 of Andi Mukta Sadguru case, the Court spelled out two exceptions to the writ of mandamus, viz. (i) if the rights are purely of a private character, no mandamus can issue; and (ii) if the management of the college is purely a private body "with no public duty", mandamus will not lie. The Court clarified that since the Trust in the said case was an aiding institution, because of this reason, it discharges public function, like government institution, by way of imparting education to students, more particularly when rules and regulations of the affiliating University are applicable to such an institution, being an aided institution. In such a situation, held the Court, the service conditions of academic staff were not purely of a private character as the staff had super-aided protection by University's decision creating a legal right and duty relationship between the staff and the management.

37. Further, the Court explained in para 20 in Andi Mukta Sadguru case that the term 'authority' used in Article 226, in the context, would receive a liberal meaning unlike the term in Article 12, inasmuch as Article 12 was relevant only for the purpose of enforcement of fundamental rights under Article 31, whereas Article 226 confers power on the High Courts to issue writs not only for enforcement of fundamental rights but also non-fundamental rights. What is relevant is the dicta of the Court that the term 'authority' appearing in Article 226 of the Constitution would cover any other person or body performing public

duty. The guiding factor, therefore, is the nature of duty imposed on such a body, namely, public duty to make it exigible to Article 226.

38. In K. Krishnamacharyulu v. Sri Venkateswara Hindu College of Engineering & Anr this Court again emphasized that:

“4...when there is an interest created by the Government in an institution to impart education, which is a fundamental right of the citizens, the teachers who impart education get an element of public interest in performance of their duties.”

In such a situation, remedy provided under Article 226 would be available to the teachers. The aforesaid two cases pertain to educational institutions and the function of imparting education was treated as the performance of public duty, that too by those bodies where the aided institutions were discharging the said functions like government institutions and the interest was created by the government in such institutions to impart education.

39. In G. Bassi Reddy v. International Crops Research Institute & Anr., the Court was concerned with the nature of function performed by a research institute. The Court was to examine if the function performed by such research institute would be public function or public duty. Answering the question in the negative in the said case, the Court made the following pertinent observations:

"28...Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the

beneficiary of the activities of the institute, it certainly cannot be said that the ICRISAT owes a duty to the Indian public to provide research and training facilities."

Merely because the activity of the said research institute enures to the benefit of the Indian public, it cannot be a guiding factor to determine the character of the Institute and bring the same within the sweep of 'public function or public duty'. The Court pointed out:

"28...In Praga Tools Corpn. v. C.A. Imanuel this Court construed Article 226 to hold that the High Court could issue a writ of mandamus 'to secure the performance of the duty or statutory duty in the performance of which the one who applies for it has a sufficient legal interest'. The Court also held that:

"6....an application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (See Sohan Lal v. Union of India, 1957 SCR 738)."

40.Somewhat more pointed and lucid discussion can be found in Federal Bank Ltd. v. Sagar Thomas & Ors., inasmuch as in that case the Court culled out the categories of body/persons who would be amenable to writ jurisdiction of the High Court. This can be found in para 18 of the said judgment, specifying eight categories, as follows:

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

positive obligation of public nature; and (viii) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function."

41. In Binny Ltd. v. V. Sadasivan the Court clarified that though writ can be issued against any private body or person, the scope of mandamus is limited to enforcement of public duty. It is the nature of duty performed by such person/body which is the determinative factor as the Court is to enforce the said duty and the identity of authority against whom the right is sought is not relevant. Such duty, the Court clarified, can either be statutory or even otherwise, but, there has to be public law element in the action of that body.

42. Reading of the categorisation given in Federal Bank Ltd., one can find that three types of private bodies can still be amenable to writ jurisdiction under Article 226 of the Constitution, which are mentioned at Sl. Nos. (vi) to (viii) in para 18 of the judgment extracted above.

43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are a catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. The reason is obvious. A private law is that part of a legal system which is a part of common law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as

distinguished from private law.

44. *Within a couple of years of the framing of the Constitution, this Court remarked in Election Commission of India v. Saka Venkata Rao that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for “any other purpose” has been held to be included in Article 226 of the Constitution with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary “private law remedies” are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (see Administrative Law, 8th Edn., H.W.R. Wade and C.F. Forsyth, p. 656). In a number of decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review.*

45. *On the other hand, even if a person or authority does not come within the sweep of Article 12 of the Constitution, but is performing public duty, writ petition can lie and writ of mandamus or appropriate writ can be issued. However, as noted in Federal Bank Ltd., such a private body should either run substantially on State funding or discharge public duty/positive obligation of public nature or is under liability to discharge any function under any statute, to compel it to perform such a statutory function.*

46. *In the present case, since ICID is not funded by the Government nor is it discharging any function under any statute, the only question is as to whether it is discharging public duty or positive obligation of public nature.*

47. *It is clear from the reading of the impugned judgment that the High Court was fully conscious of the principles laid down in the aforesaid judgments, cognizance whereof is duly taken by the High Court. Applying the test in the case at hand, namely, that of ICID, the High Court*

opined that it was not discharging any public function or public duty, which would make it amenable to the writ jurisdiction of the High Court under Article 226. The discussion of the High Court is contained in paras 34 to 36 and we reproduce the same for the purpose of our appreciation:

“34. On a perusal of the preamble and the objects, it is clear as crystal that the respondent has been established as a scientific, technical, professional and voluntary non-governmental international organisation, dedicated to enhance the worldwide supply of food and fibre for all people by improving water and land management and the productivity of irrigated and drained lands so that there is appropriate management of water, environment and the application of irrigation, drainage and flood control techniques. It is required to consider certain kind of objects which are basically a facilitation process. It cannot be said that the functions that are carried out by ICID are anyway similar to or closely related to those performable by the State in its sovereign capacity. It is fundamentally in the realm of collection of data, research, holding of seminars and organising studies, promotion of the development and systematic management of sustained irrigation and drainage systems, publication of newsletter, pamphlets and bulletins and its role extends beyond the territorial boundaries of India. The memberships extend to participating countries and sometimes, as bye-law would reveal, ICID encourages the participation of interested national and non-member countries on certain conditions.

35. As has been held in Federal Bank Ltd. [Federal Bank Ltd. v. Sagar Thomas, (2003) 10 SCC 733] solely because a private company carries on banking business, it cannot be said that it would be amenable to the writ jurisdiction. The Apex Court has opined that the provisions of the Banking Regulation Act and other statutes have the regulatory measure to play.

The activities undertaken by the respondent Society, a non-governmental organisation, do not actually partake the nature of public duty or State actions. There is absence of public element as has been stated in V.R. Rudani and Sri Venkateswara Hindu College of Engg. It also does not discharge duties having a positive application of public nature. It carries on voluntary activities which many a non-governmental organisations perform. The said activities cannot be stated to be remotely connected with the activities of the State. On a scrutiny of the Constitution and bye-laws, it is difficult to hold that the respondent Society has obligation to discharge certain activities which are statutory or of public character. The concept of public duty cannot be construed in a vacuum. A private society, in certain cases, may be amenable to the writ jurisdiction if the writ court is satisfied that it is necessary to compel such society or association to enforce any statutory obligation or such obligations of public nature casting positive public obligation upon it.

36. As we perceive, the only object of ICID is for promoting the development and application of certain aspects, which have been voluntarily undertaken but the said activities cannot be said that ICID carries on public duties to make itself amenable to the writ jurisdiction under Article 226 of the Constitution.”

32. To establish whether the test laid down by the Supreme Court in **Pradeep Kumar Biswas** case are satisfied in the case in hand, it is necessary to have a look on the provisions of the MoA and also the AoA of the GJEPC. The provision relied on by respondent No.2 are as stated in paragraph 14 above.

33. I may, at this stage, reproduce the relevant clauses of the MoA and AoA, referred to by the petitioner, as under:-

Clause 9 *No alteration shall be made to this Memorandum of*

Association or to the Articles of Association of the Company which are for the time being in force, unless the alteration has been previously submitted to and approved by the Central Government.

Clause 2.1 *Articles to be subject to export import Policy: The provisions of these articles shall be subject to those of the Export-Import Policy, as notified by the Central Government from time to time.*

Clause 11.3 *Nominated and Co-opted Members*

A nominated or co-opted member shall have no right to vote.

Clause 27.3 *Composition of the Committee:*

1. The Committee of Administration shall have the following members;

(a) Elected members with a minimum of ten and maximum of twenty four (including the Regional Chairman, Chairman, Vice Chairman and the other members of the Committee elected from the Panels constituted under Article 23 of these articles).

(b) Nominated members, not exceeding three in number.

(c) Members nominated by the Committee due to vacancy arising due to non-filing or withdrawal of nomination at the time of election subject to the maximum number of members as stipulated under Article 27.3 (1)(a)

2. Subject to the provisions of clause (1), the number of members of the Committee shall be laid down by Election Rules made by the Council.

Clause 27.6 *Certain further provisions as to nominated*

members:

(a) The term of office of members of the Committee who are nominated by the Central Government shall be co-terminus with the term of the committee. Provided that, if a member is nominated during the term of the Committee his term of office shall be such as the Central Government may specify.

(b) The Central Government may, at any time, require such a nominee to relinquish his office and may appoint another person in his place.

(c) The term of the office of the member nominated by the Committee to fill in the vacancy pursuant to the Article 20.1(c), 24.1(k), 27.3(1)(c) shall be for a period of 2 (two) years till the next election of the Committee.

Clause 33.5 Internal Resources: *At least 50 per cent of the internal resources of the Council excepting those derived from Government grants shall be utilized for development activities like market studies, dissemination of trade information, buyer-seller meets, exhibitions, technical training, other promotional activities etc.*

Clause 39.3 Time and place *The Committee shall from time to time, by rules determine whether and to what extent and at what times and places and under what conditions, the accounts and books of the Council or any of them shall be open for the inspection of the members (not being members of the Committee) and no member (not being member of the Committee) shall have any right to inspect any account or book or document of the Council, except as provided by law or*

authorized by the Committee or by a resolution of the Council in a general meeting. Provided that, the accounts and books of the Council shall be open for inspection by an officer duly authorized in this behalf by the Central Government for ascertaining or verifying the income and expenditure of the Council or for such other purposes as may, by agreement between the Council and the Central Government, be specified in this regard.

Clause 44. INVESTMENT OF FUNDS

Clause 44.1 *Investment* The funds of the Council, which are not required for current expenditure may be placed in fixed deposit with any scheduled bank or may be invested in any security in which trust property may lawfully, be invested under section 20 of the Indian Trusts Act, 1882, subject to such instructions as may be issued from time to time by the Government of India, in the Department of Public Enterprises, with reference to investments.

Clause 47. POWERS OF THE CENTRAL GOVERNMENT

Clause 47.1 *Power to give directions* (1) The Central Government shall have power to give directions to the Council as to the performance of the functions, where the Government considers such directions to be necessary:

- a. in the interest of national security, or*
- b. in the interests of the national economy, or*
- c. otherwise in the public interest.*

(2) The Central Government shall also have power to call for such reports, returns and other information with respect to the

property and affairs of the Council, the conduct of its business and other matters connected with the performance of its functions, as the Central Government may consider necessary.

(3) The Council shall be bound to comply with all directions issued by the Central Government under sub-article'(1) or (2) of this article and all provisions contained in the Export-Import Policy of the Central Government for the time being in force.

Clause 47.2 Foreign Collaboration *All agreements between the Council and any foreign collaborator shall require prior approval of the Central Government.*

Clause 48. ALTERATION IN ARTICLES: *No addition to, modification in, or deletion of, any of these articles shall be made without the prior approval of the Central Government*

Clause 49. REPUGNANCY TO COMPANIES ACT: *where, in relation to a council to which the companies Act, 2013 applies, there is a repugnancy between the provisions of these articles and the procedures of that Act, the procedures of the Act shall to the extent of the repugnancy overrule the provisions of these articles.*

Clause 51. GENERAL POWER TO MODIFY. *The central Government may at any time direct by an order in writing that the provisions of these articles shall stand modified in such manner as the central Government may direct, as in relation to councils generally or be in relation to a group of councils or a particular council where such a direction appears to be necessary in public interest.*

34. The pleas of the petitioner primarily are:-
- (I) GJEPC functions under the sponsorship of MoC;
 - (II) The MOCI exercises control over the GJEPC;
 - (III) GJEPC substantially finances through MOCI;
 - (IV) It has a governmental character;
 - (V) Reply dated February 09, 2021 to an RTI application, it is seen that MOCI exercises substantial degree of control over the trading activities of respondent No.2;
 - (VI) The appointment and recruitment procedure contains similar conditions of service, which conform with Article 311 of the Constitution of India;
 - (VII) GJEPC satisfies the test laid down by the Supreme Court in the various judgments inasmuch as it was set up with active patronage of the Department of Commerce in order to augment international trade policy; formation of various export promotion councils under the administrative control of the Department. These bodies were registered under the Companies Act and/or Societies Registration Act.
 - (VIII) These councils function as the registering authority for exporters under the Foreign Trade Department of the Government.
 - (IX) The respondent No.2 is discharging public duty on behalf of the Union of India to espouse the cause of export promotion by facilitating around 7000 members in foreign trading of gem and jewellery items.

(X) Clause 48 of the AoA states alteration to MoA or Articles of Association shall not be carried out without the approval of the Central Government.

(XI) Even the annual report along with Audit and Accounts report are reviewed in both houses of Parliament.

35. She also stated that the Government also appointed three officials in the Board of Management and the Government not only gives financial assistance to various projects of the GJEPC but also retains full control and supervision over the utilization of the funds, Government Auditors are deputed by the Department of Commerce to verify the utilization of Government grant under various schemes such as MDA and MAI, ASIDE etc.

36. I am not impressed by the submissions made by the petitioner, inasmuch as it is not disputed that GJEPC is a Company registered under Section 25 of the Companies Act, 1956 and as such, not a statutory body. It was established by eight persons, not connected with the Government. It has a voluntary Membership and is not controlled by any State. The functions of GJEPC are primarily to support, protect, maintain increase and promote the export of gems and jewellery, a function, which is not a governmental function. As of today, there are 6506 Members, none of whom are representatives of the Central Government. The Committee of administration manages GJEPC consisting of 24 Members, who are neither appointed nor nominated by respondent No.1. The nominated Members of the Government cannot exceed three in number. The nominated

Members have no voting rights and therefore, cannot participate in the decision making process of the Committee. The Committee controls the finances, staff and appointments, renewal, cancellation, suspension and termination of its Members. It is the Committee which make Rules in relation to conditions of service, appointment, promotion, dismissal etc. The primary source of funds is the subscription of Membership, which are sufficient for the proper functioning of the GJEPC. It is stated that no funding is provided by respondent No.1. The only funding received by GJEPC from the respondent No.1 is for a particular project as and when certain specific export, promotion activities under the MAI scheme and MDA scheme are taken up, and the said funds are used for the specific use and no portion is utilized for any other activity beyond the scheme. I note that the affidavit filed on behalf of the respondent No.1 clearly states that the GJEPC is an incorporated, autonomous body which regulates its own affairs and that the Department of Commerce (MOCI) does not exercise any power or control over it and respondent No.1 does not have any concern in the routine functioning of GJEPC. The respondent No.1 states that the only power exercised by the government is enumerated in clause 47 of the AoA. The said clause empowers the Central Government to give direction to the Council in the interest of national security, national economy and public interest. Surely the Government can have such a control on any person / entity within the country in the larger public interest. Connected to such a power is the power of the Central Government to call for reports with respect to property; affairs of

the Council, foreign collaboration etc. Similarly, the alteration of AoA or MoA with the approval of the Central Government has to be read in conjunction with clause 47 of the AoA. Mr. Mishra is justified in stating that at no point of time, the grants exceeded more than 27%.

37. In the judgment of ***Raj Rajeshwar Dadhich (supra)***, the Rajasthan High Court had considered in paras 9 to 15, some of the salient features of the MoA and AoA as existed. The said paras are reproduced as under:-

“(9) It is an admitted position of both the parties that the Council is a body registered under the Companies Act, 1958. The Council was formed by 8 individuals who applied for registration of the Council under the Companies Act as its subscribers. These persons were:

(10) Sarvashri Khailshankar Durlabhji, Bhola Nath, Sultan Singh Backliwal, Vrij Lal C. Mehta, Pravin N. Nanavati, Kantilal Chhotalal, Kirtilal K. Doshi and Jaisukhlal D. Jhaveri.

(11) The Memorandum of Association of the Council specifies its objects. The main objects for which the Company has been established are to support, protect, maintain increase and promote the export of gems and jewellery including pearls, coloured gemstones, diamonds, synthetic stones, costume, fashion jewellery, gold and non-gold jewellery and articles thereof by such methods as may be necessary or expedient. There are several ancillary objects and two of them are advised or represent to Government, local authorities and Public bodies on:—

(a) the policies and other measures, including direct and indirect taxation, adopted by them in relation to their effect on industry or commerce;

(b) the steps to be taken by them to prevent and contravention of the codes of practices laid down by the Company, by any of the persons concerned where such contravention would affect the exports of gems and jewellery provided that such advice or representation shall be only so far as such policies or measures have a bearing directly or otherwise on the export of aforesaid goods.

(12) Another ancillary object is to assist the Government authorities in appraisal of aforesaid goods, as and when called upon to do so. Clause 5 of the Memorandum of Association contemplates that every member of the Company other than the officials of the Government undertakes to contribute to the assets of the company in the event of the same being wound up during the time, he is a member or within one year afterwards, for payment of the debts and liabilities of the Company contracted prior to the date on which he ceases to be a member and of the costs, charges and expenses of winding up the same.....

(13) Articles of the Association of the Company contain other details. Paras 5, 10, 13, 18, 25, 34, 65 A of the Articles of Association are relevant and are therefore, reproduced below:—

“5. All rights and privileges of members shall be as laid down in the bye-laws framed by the Working Committee from time to time.

10. The affairs of the Council shall be managed by a Working Committee.

13. There shall be an elected Chairman and an elected Vice Chairman for the Council. The term of office of the Chairman shall be two years and that of the Vice-Chairman, one year. The Chairman and Vice Chairman shall be elected from amongst the elected members of the Working Committee and they shall be Chairman and Vice-Chairman respectively of the Working Committee,

Committee of Administration and all other Committees of the Council. From among the Chairman and Vice-Chairman, atleast one of them shall be a person residing in bombay.

18. The Working Committee shall delegate such functions as it deems fit for the administration and management of the affairs of the Council to the Committee of Administration consisting of the Chairman, the Vice Chairman, six members nominated by the Chairman of the Council in consultation with the panel members of the Working Committee and two nominees of the Union Government.

25. The Secretary shall not be a member of the Council and shall be a full time and paid officer whose appointment will be approved by the Government.

34. There shall be a full time and paid Secretary and such other officers to the Council as may be determinated (sic) from time to time by the Council.

65A. The Central Government shall have the power:—

(i) To give general directions to the Council as to the exercise and performance of its functions in matters involving National security or substantial public interest and to ensure that the Council gives effect to such directions;

(ii) To call for such reports returns and other information with respect to the property and activities of the Council as may be necessary and required from time to time;

(iii) To approve the Council's revenue and capital budget i.e. the Revised Estimates and Budget Estimates; and

(iv) To approve such agreements involving foreign collaboration proposed to be entered into between the Council and the Foreign Collaborators.”

(14) Apart from the provisions Article 54 provides that accounts and books of the Council shall be open for inspection by officer duly authorised in this behalf by the Union Government for ascertaining or verifying the income and expenditure of the Council or for such other purpose as may by an agreement between the Council and the Union Government be specified in this regard.

(15) Article 65 provides that a certified copy of the Accounts and the Auditor's report shall be forwarded to the Union Government. The budget is required to be sanctioned by the Working Committee in consultation with the Union Government as per Article 66. The current account of the Council is required to be kept in a Bank approved by the Union Government. Article 73 provides that no change, alteration or modification shall be made in any of the foregoing articles than the prior concurrence of the Union Government.”

38. The Rajasthan High Court in the case of **Raj Rajeshwar Dadhich** (*supra*), has, on the issue whether the Central Government has deep pervasive control, in para 16, held as under:-

“(16) All these provisions show some degree of control of the Government of India in the functioning of the Council. However, the question is as to whether the control of the Government of India can be described as so wide, deep and pervasive to such an extent as to convert the Council into an agency or instrumentality of the Government of India. The main object of the Council which has been referred to herein above shows that the Council has been established for furtherance of the interest of the Gemstone and Jewellery industry. The fact is that it came into the existence on account of the choice and agreement of few individual persons. The Government had not played any role in the creation of the Council. It is true that the Government provides funds to the Council but this is not the only source of income of the council. The

Control which the Government of India exercises on it is by the large limited to oversee that the funds provided by it are utilised properly and are not misused by the Council. The entire functioning of the Council is carried on by the Working Committee. There is no direct interference of the Government of India in the functioning of the Council or its working. The Working Committee consists of dozens of persons and only 3 of them are nominated by the Government. They too do not have a power of veto in the management of the affairs of the Company. The general direction that the Government of India can give to the Council do not have any direct impact on the day today functioning of the Council. There is no indication in the Memorandum of Association or Articles of Association that the Council discharges any governmental or State function nor can it be said that its functioning is of a public importance. There is also nothing to show that the Council is a body having a public character. Therefore, in my opinion the composition of the Council, its functioning, its objects are no such which can bring it within the scope of the term "other authorities" used in Article 12 of the Constitution of India.

(emphasis supplied)

39. The Supreme Court in the case of ***Tek Raj Vasandhi v. U.O.I. ((1988) 1 SCC 236)***, while dealing with an issue whether Institute of Constitutional and Parliamentary Studies fall within the purview of the term other authorities, has in paras 4, 5, 16, 17 and 20, held as under:-

"4. ICPS, respondent 2, is a society registered under the Societies Registration Act, 21 of 1860, and was registered on March 9, 1965. As would appear from its memorandum of Association, the foundation members were 19 in number 13 being members besides a President and five Vice Presidents. The First President of the Society was the then Speaker of the Lok Sabha. The five Vice-Presidents were the then Minister of Railways,

Minister of Law and Social Security, Minister of Communication and Parliamentary Affairs, a Former Chief Justice of India and a former Attorney General of India. Dr. L.M. Singhvi the then a member of the Lok Sabha, was its Executive Chairman. The public Trustee in the Department of Company Affairs and Insurance in the Ministry of Finance was the Director and a member of the Lok Sabha was the Society's Treasurer. The then Minister of Cultural Affairs in the Ministry of Education along with three members of the Lok Sabha, a Senior Advocate of the Supreme Court, a member of the Rajya Sabha, the then Vice -Chancellor of Rajasthan University, the respective Secretaries of the Lok Sabha and the Rajya Sabha, Secretariats and the Secretary in the Ministry of Law were its Members. The registered office of the society was initially located within the Parliament House but was later on shifted to the Vithailbhai Patel House, Rafi Marg, new Delhi. The objects of the Society inter alia were:

(1) to promote and provide for constitutional and parliamentary studies with special reference to comparative studies in constitutional systems of various countries and working of the Indian Constitution and parliamentary and governmental institutions in their various aspects;

(2) to undertake study of courses and fundamental research relating to developments in constitutional law, conventions and practices, parliamentary matters;

(3) to organise inter alia training programmes in constitutional problems and matters of current parliamentary importance;

(4) to set up a legislative research and reference service for the benefit of all interested members of the Union Parliament and State legislatures irrespective of their party affiliations;

(5) to undertake and provide for the publication of a journal and of research papers and of books and

brochures with a view to disseminate democratic values and to foster broad based civil education and awareness, and in particular, to promote study of constitutional and parliamentary affairs;

(6) to establish and maintain libraries and information services to facilitate the study of constitutional and parliamentary subjects and spread information in regard thereto;

(7) to invite as and when feasible, scholars who may or may not be members of the Society, to take advantage of the facilities offered by the Society and to benefit the society by their knowledge and experience; and

(8) to institute appropriate fellowships, offer prizes and arrange scholarships and stipends in furtherance of the objects of the Society.

5. *The memorandum permitted the Society to accept gifts, donations and subscriptions of cash and securities and of any property either movable or immovable. The rule classifies the members under heads like Founder Members, Life Members, Honorary Members, Ordinary Members, Corporate Members and Associate Members. Ordinary membership, according to the Rules, would extend to members of Parliament or of any State legislature or those who have been or are members of the judiciary or advocates of the Supreme Court or the High Courts or persons employed in public service or persons engaged in teaching of study of social sciences particularly of Political Science, Law or subjects related thereto. In the category of Honorary Members were the President, the Vice-President and the Prime Minister of India. Though the Memorandum permitted receipt of gifts and donations from outside, it is not disputed that the main source of income of the Society has been the annual Central Government grant.*

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16. The objects of the Society were not governmental

business but were certainly the aspects which were expected to equip Members of Parliament and the State legislatures with the requisite Knowledge and experience for better functioning. Many of the objects adopted by the Society were not confined to the two Houses of Parliament and were intended to have an impact on society at large.

17. The Memorandum of the Society permitted acceptance of gifts, donations and subscriptions. There is material to show that the Ford Foundation, a US based. Trust had extended support for some time. Undoubtedly, on annual contribution from the Government has been substantial and it would not be wrong to say that they perhaps constitute the main source of funding, yet some money has been coming from other sources. In later years, foreign funding came to be regulated and, therefore, it became necessary to provide that without Government clearance like any other institution, ICPS was not to receive foreign donations. No material has been placed before us for the stand that the Society was not entitled to receive contributions from any indigenous source without government sanction. Since government money has been coming, the usual conditions attached to Government grants have been applied and enforced. If the Society's affairs were really intended to be carried on as a part of the Lok Sabha or Parliament as such, the manner of functioning would have been different. The accounts of the Society are separately maintained and subject to audit in the same way as the affairs of societies receiving government grants are to be audited. Government usually impose certain conditions and restrictions when grants are made. No exception has been made in respect of the Society and the mere fact that such restrictions are made is not a determinative aspect.

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20. We have several cases of societies registered under Societies Registration Act which have been treated as 'State' but in each of those cases it would appear on analysis that either governmental business had been undertaken by the Society or what was expected to be the

public obligation of the 'State' had been undertaken to be performed as a part of the Society's function. In a Welfare State, as has been pointed out on more than one occasion by this Court, governmental control is very pervasive and in fact touches all aspects of social existence. In the absence of a fair application of the tests to be made, there is possibility of turning every nongovernmental society into an agency or instrumentality of the State. That obviously would not serve the purpose and may be far from reality. A broad picture of the matter has to be taken and a discerning mind has to be applied keeping the realities and human experiences in view so as to reach a reasonable conclusion. 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. We must 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."

(emphasis supplied)

40. The stress laid down by the petitioner that the accounts are being audited by the Central Government and the reports being placed before both the Houses of Parliament, prove pervasive control is not appealing. The power to audit the accounts exists because the Central Government is providing funds under certain Schemes; it must ensure, that the spending and investments made are proper and justified; the same would not *ipso-facto* mean, the Government has a pervasive control.

41. The petitioner has relied upon the judgment of the Division Bench of the Calcutta High Court in the case of ***Sunirmal Kumar Roy (supra)***. The Single Judge of the Court held that CAPEXIL is not amenable to the writ jurisdiction. The

Division Bench by referring to the judgments noted above including *Pradeep Kumar Biswas (supra)*, *Zee Telefilms (supra)* and also Clause 2.65.1 in the hand book of MOCI held that CAPEXIL is not free to decide their course contrary to the policy of the Government. It also held that the primary and sole objective of the Government is to promote and / or espouse the cause of the chemical and allied industry relating to export under the patronage of the MOCI. It controlled the entire export trade promotion abroad on behalf of the Government of India. Its Managing Committee has a substantial control through Central Government having five representatives nominated by the Government. Only because the financial aid is not to the extent it was required compared to the expenditure of the Company or that its audit is not being conducted by the Comptroller and Auditor General, it would not be appropriate to exclude the body from the purview of Article 12. Suffice to state that reliance was placed by the Court on Clause 2.65.1 of the handbook of the procedure published by the Ministry of Commerce and Industry which reads as under:

“EPCs shall be autonomous and shall regulate their own affairs. However, if Central Government frames uniform by-laws for constitution and/or for transaction of business for EPCs, they shall adopt the same with such modifications as the Central Government may approve having regard to the subject-nature or functioning of such EPC”.

42. Though it is not clear whether the said handbook of procedure continues to hold field as of now, in any case the petitioner has not placed any reliance on the said clause of

handbook of procedure. Be that as it may, clause 2.65.1 only states, Export Promotion Councils shall be autonomous and shall regulate their own affairs. The clause is an enabling provision, in the eventuality the Central Government frames uniform by-laws for constitution and / or transaction of business for Export Promotion Councils, they shall adopt the same with such modification as the Central Government may approve, having regard to the subject-nature or functioning of such Export Promotion Councils. This clause has to be read in conjunction with Clause 47 of the AoA. I have reproduced the intent behind the said clause in Para 36 above. The said clause cannot be read to mean that the Central Government has a pervasive control on the organisation both financially / administratively. Hence, with due respect, I am not in agreement with the conclusion drawn by the Division Bench. I cannot read the said clause to have an effect of the Central Government having a pervasive control over the organization.

43. The petitioner has also relied upon the Judgment in the case of ***DAV College Trust and Managing Society & Ors.*** (*supra*) to contend that even if a body gets grant less than 50%, the same can be termed to be substantially financed. The said conclusion of the Supreme Court was while considering an issue whether a particular body is a public authority under the provision of Right to Information Act, 2005 and not while considering the view of “other authority” in Article 12 of the Constitution. Suffice to state, as depicted in the chart in Para 12 above, it is clear that the maximum grant received by the GJEPC

is 27% and at times like in the year 2004-2005 the grant was only 3%. In this regard I may refer to the Judgment of the Supreme Court in the case of ***General Manager, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad***, (2003) 8 SCC 639, wherein the Apex Court held as under:

“8. From the decisions referred to above, it would be clear that the form in which the body is constituted, namely, whether it is a society or a cooperative society or a company, is not decisive. The real status of the body with respect to the control of Government would have to be looked into. The various tests, as indicated above, would have to be applied and considered cumulatively. There can be no hard-and-fast formula and in different facts/situations, different factors may be found to be overwhelming and indicating that the body is an authority under Article 12 of the Constitution. In this context, bye-laws of the Mill would have to be seen. In the instant case, in one of the writ applications filed before the High Court, it was asserted that the Government of Uttar Pradesh held 50% shares in the Mill which fact was denied in the counter-affidavit filed on behalf of the State and it was averred that majority of the shares were held by canegrowers. Of course, it was not said that the Government of Uttar Pradesh did not hold any share. Before this Court, it was stated on behalf of the contesting respondents in the counter-affidavit that the Government of Uttar Pradesh held 50% shares in the Mill which was not denied on behalf of the Mill. Therefore, even if it is taken to be admitted due to non-traverse, the share of the State Government would be only 50% and not entire. Thus, the first test laid down is not fulfilled by the Mill. It has been stated on behalf of the contesting respondents that the Mill used to receive some financial assistance from the Government. According to the Mill, the Government had advanced some loans to the Mill. It has nowhere been stated that the State used to meet any expenditure

of the Mill much less almost the entire one, but, as a matter of fact, it operates on the basis of self-generated finances. There is nothing to show that the Mill enjoys monopoly status in the matter of production of sugar. A perusal of the bye-laws of the Mill would show that its membership is open to canegrowers, other societies, Gram Sabha, State Government etc. and under Bye-law 52, a Committee of Management consisting of fifteen members is constituted, out of whom, five members are required to be elected by the representatives of individual members, three out of the cooperative society and other institutions and two representatives of financial institutions besides five members who are required to be nominated by the State Government which shall be inclusive of the Chairman and Administrator. Thus, the ratio of the nominees of the State Government in the Committee is only 1/3rd and the management of the Committee is dominated by 2/3rd non-government members. Under the bye-laws, the State Government can neither issue any direction to the Mill nor determine its policy as it is an autonomous body. The State has no control at all in the functioning of the Mill much less a deep and pervasive one. The role of the Federation, which is the apex body and whose ex officio Chairman-cum-Managing Director is the Secretary, Department of Sugar Industry and Cane, Government of Uttar Pradesh, is only advisory and to guide its members. The letter sent by the Managing Director of the Federation on 22-11-1999 was merely by way of an advice and was in the nature of a suggestion to the Mill in view of its deteriorating financial condition. From the said letter, which is in the advisory capacity, it cannot be inferred that the State had any deep and pervasive control over the Mill. Thus, we find none of the indicia exists in the case of the Mill, as such the same being neither an instrumentality nor an agency of the Government cannot be said to be an authority and, therefore, it is not State within the meaning of Article 12 of the Constitution.

(emphasis supplied)

44. In so far as the Judgments relied upon by the petitioner are concerned, in *BCCI (supra)* and *Zee Telefilms Ltd. (supra)*, the Supreme Court held that the Board falls within the definition of “State” for the purpose of Article 12, as the BCCI discharge public duties, inasmuch as, it selects the Indian Cricket team, controlling activities of the players and others involved in the game of cricket and such activities are akin to state functions. Suffice to state, the judgment has no applicability to the facts of this case inasmuch as the GJEPC, is not performing state function. It is a body of individuals who are undertaking the export of gems and jewellery, being in the business of the same. They are working for the own benefit and pay duties on their export as per the regulation of the Central Government. I have already in detail dealt with the provision of MoA and AoA showing the control exercised by the Central Government. The judgments are clearly distinguishable and have no applicability.

45. The reliance placed by the petitioner on the judgment of the Supreme Court in *Sukhdev Singh (supra)* is misplaced as in the said Judgment the Supreme Court was dealing with entities like LIC, ONGC and IFICI, bodies constituted under different statutes to hold that they are “authorities” within the meaning of Article 12 of the Constitution. The Judgment has no applicability in the facts of the instant petition.

46. In so far as the reliance on the judgment of Bombay High Court in *Meenakshi Patel & Ors. (supra)* is concerned, the issue in that case was whether the Central Government is the appropriate authority within the meaning of Section 2(a) of the

Industrial Disputes Act, 1947. Hence the Judgment has no applicability.

47. In so far as the reliance placed by the petitioner in the case of *All India Garment Exporters Common Cause Guild and Ors. (supra)* is concerned, there the Coordinate Bench of this Court by relying upon the judgment of the Supreme Court in *Zee Telefilms (supra)* has held that Export Promotion Councils exercised an important public function of ensuring the implementation of the EXIM Policy. Further in terms of Chapter XIII of EXIM Policy which is a statutory document made in terms of Section 5 of Foreign Trade (Development and Regulation) Act, 1992, the Export Promotion Council is a monopolistic body through whom every exporter is bound to export garments to the quota countries. In other words, Export Promotion Councils virtually controls the export of garments and its decisions effect the rights and interest of the garment exporters and hence Export Promotion Council is amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. It is not the case of the petitioner herein that the respondent organization exercise any of the functions under the EXIM Policy framed under Section 5 of the Foreign Trade (Development and Regulation) Act. As such the said judgment has no applicability in the facts of this case.

48. In so far as the reliance placed by the petitioner on the judgment of the Madras High Court in Council for *Leather Exports (supra)* is concerned, the said judgment is a decision of the High Court on a tax dispute raised by the petitioner therein

namely M/s. Council for Leather Exports. There is an observation in Para 4 of the order of the High Court that the petitioner is also a Government of India undertaking sponsored by the Ministry of Commerce and Industry. It appears that the petitioner is laying stress on this observation of the High Court. Suffice to state that the petitioner in that case is not the organization with which this Court is concerned. In any case, the issue before the High Court was not whether Council for Leather Exports is an “*other authority*” within the meaning of Article 12 of the Constitution of India. Hence, this Judgment has no applicability. Similarly, in the case of **A.R. Abdul Gaffer** (*supra*), this Court was dealing with organization called National Book Trust to hold that the same is an “*other authority*” within the meaning of Article 12 of the Constitution of India. The Court has on a finding that the Trust therein owes its existence to the resolution passed by the Government and runs primarily by the funds provided by the Government and all pervasive administrative control rests with the Government has come to a conclusion that it is an “*other authority*” within the meaning of Article 12 of the Constitution, hence the said Judgment is distinguishable.

49. It must be held that GJEPC is not discharging any public / state functions and as such not an ‘*other Authority*’ within the meaning of Article 12 of the Constitution of India and as such, the present petition under Article 226 of the Constitution of India is not maintainable. The plea of maintainability of the petition, advanced by learned counsel for the respondent No.2 need to be

accepted and without going into the merits of the challenge to the termination of the petitioner, and the Judgments relied upon by the petitioner on the merits of the case, the present petition is liable to be dismissed. It is ordered accordingly.

50. Before parting with the case, I must state that the liberty is with the petitioner to seek any appropriate remedy as available to her in law.

CM No. 14602/2021 (for direction)

Dismissed as infructuous.

V. KAMESWAR RAO, J

JULY 09, 2021*/ak/jg*



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