**IN THE HIGH COURT OF JUDICATURE AT PATNA**
**Letters Patent Appeal No.1284 of 2019**
**In**
**Civil Writ Jurisdiction Case No.3344 of 2003**

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Mr. Gyan Prakash Son of Late Banshidhar Prasad, Resident of Mohalla-Babunia, P.O./P.S./District-Siwan.

... ... Appellant/s

Versus

1. The State of Bihar through the Principal Secretary, Industries Department, Government of Bihar, Patna.
2. Institute of Entrepreneurship Development, Bihar through the Executive Director of the said Instittue (Bihar State Finance Corporation Building, 05th Floor, Frazer Road, Patna-800 001 at present 3rd Floor, Udyog Bhawan, East of Gandhi Maidan, Patna.
3. Mr. K.K. Pathak, IAS, Executive Director of the said Institute (BSFC) Building, 05th Floor, Exhibition Road, Patna at present 3rd Floor, Udyog Bhawan, East of Gandhi Maidan, Patna.
4. Mr. C.B.P. Srivastava, Manager of the said Institute (BSFC) Building, 05th Floor, Exhibition Road, Patna at present 3rd Floor, Udyog Bhawan, East of Gandhi Maidan, Patna.

... ... Respondent/s

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**Appearance :**

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| For the Appellant/s | : | Mr.Raghav Prasad No.1, Advocate |
| For the Respondent No.2: | | Mr. Utsav Anand, Advocate |
| For the State | : | Mr. Rakesh Ambastha, AC to AAG-7 |

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**CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI**
**and**
**HONOURABLE MR. JUSTICE RAJIV ROY**
**ORAL JUDGMENT**
**(Per: HONOURABLE MR. JUSTICE P. B. BAJANTHRI)**

**Date : 28-09-2022**

Heard learned counsels for the parties.

2. The instant appeal is against the order of the learned single Judge dated 30.08.2019 passed in C.W.J.C. No. 3344 of 2003.

3. Appellant Mr. Gyan Prakash who was initially

appointed as a Trainer /Motivator on 16.01.1989. Thereafter, his services were regularized against the post of Training Faculty. He has rendered 14 years of service. On 19.07.2002, he had applied study leave and it was rejected orally on 19.07.2002 itself. It is alleged by the appellant that he was compelled to furnish resignation letter and he had given resignation letter with a condition that resignation would be effective from 01.04.2003. Ignoring the contents of resignation letter, respondents proceeded to accept the resignation letter on 19.07.2002 itself. The appellant submitted protest letter on 02.08.2002 and it was rejected on 19.08.2002. In this backdrop, appellant has filed C.W.J.C. No. 3343 of 2003 with following prayer in the writ petition:-

> **"That this is an application for setting aside the proposed letter of registration by the petitioner written under pressure on 19.7.2002 and for issuance of a writ of mandamus to re-instate the petitioner with retrospective effect, i.e. w.e.f. 19$^{th}$ July 2002 and to declare article 20(1) of the service regulation of the "Institute of Entreprenership development, Bihar" (Herein after referred to as the "Institute") on the ground that it ultra vires of Article 14 of the constitution of India and grant other consequential benefits arising from the finding of the Hon'ble Court on the prayers made above."**

4. The learned single judge proceeded to dismiss

appellant's petition only on the sole ground that Respondent-institution would not fall under the definition of Article 12 of the constitution so as to entertain writ petition under article 226 of the constitution. He has relied on Apex Court's decision namely ***Rajbir Surajbhan Singh Vs. Chairman, Institution Of Banking Personnel Selection, Mumbai*** reported in ***(2019) 14 SCC 189 – 2019 (3) PLJR (SC) 227.***

5. Learned counsel for the petitioner submitted that learned single Judge has committed error in not noticing Memorandum of Association of Institute of Entrepreneurship Development, Bihar read with rules of the institute. It is submitted that Memorandum of Association and other related issue in respect of Respondent-Institute cannot be compared with the Institute of Banking Personnel Selection, Mumbai (vide citation Supra). It is further submitted that it all depends on factual aspects of the matter. It is to be examined whether particular Institute or Organization would fall under the definition of Article 12 of the Constitution or not? He has pointed out various paragraphs of Memorandum of Association of the Institute and Rules of the Institute to contend that learned single Judge has committed error and the cited decision in the case of ***Rajbir Surajbhan Singh Vs. Chairman, Institution Of***

***Banking Personnel Selection, Mumbai*** do not assist the Respondent-Institute, having regard to the functioning of the Institute in terms of Memorandum of Association read with Rules.

6. Per contra, learned counsel for the Respondent-Institute resisted the aforesaid contentions and submitted that writ petition is not maintainable as the Institute- Respondent do not fall under the definition of Article 12 of the Constitution and there is no infirmity in the order of the learned single Judge.

7. It is a case of remand to the learned single Judge in the event of holding that Respondent-Institute would fall under the definition of Article 12 of the Constitution. At the same time, having regard to the fact that writ petition is of the year 2003, it is not appropriated to remand the matter to the learned single Judge. Therefore, with the consent of the learned counsels for the respective parties, we are proceeding to decide preliminary issue as well as on merit.

8. Heard learned counsel for the respective parties.

9. **<u>Jurisdiction of this Court:</u>**

Core issue involved in the present litigation is whether writ petition filed by the appellant/petitioner against the Respondent-Institute is maintainable or not? Further, the appellant has made out a *prima facie* case so as to interfere with the acceptance of resignation letter dated 19.07.2002 or not? Undisputed facts are that appellant was initially appointed as a Trainer/Motivator on 16.01.1989 and his services were regularized against post of Training Faculty. He had submitted study leave application on 19.07.2002 and it was orally rejected and alleged to have compelled the appellant to submit his resignation and he had submitted his resignation on 19.07.2002 with a rider that resignation would be accepted with effect from 01.04.2003. On the other hand, resignation is dated 19.07.2002, and such acceptance of resignation is on 19.07.2002 and it is contrary to Regulation 20 of Institute of Entrepreneurship Development, Bihar, Staff Service Regulation, 1989 (for short Regulation,1989). In order to ascertain whether Respondent-Institute would fall under definition of Article 12 of the Constitution, it is necessary to reproduce certain provisions of Memorandum of Association of the Institute. Clause 4 is relating to objects which reads as under:

> **"4. <u>Objects:</u>**
>
> The objects for which the institute is established are:
>
> (i) to search, encourage, identify and select potential entrepreneurs and develop them for setting up tiny, rural, small or medium scale and other, industrial, commercial or servicing ventures with a view to accelerate

industrial development and expand productive employment.

(ii) to provide training and instructions in all aspects of setting up and running a venture to potential and existing entrepreneurs, educated unemployed, low income and under privileged groups, women, science and technology graduates, village artisans and others to help and assist them by imparting training and instructions in all matters relating to industry and business, such as motivation, management, finance, production, marketing, technology, accounts, labour laws, taxation laws, etc.

(iii) to conduct various Training programmes for entrepreneurs, educated unemployeds, women, low income groups and under privileged group, science & technology graduates, village artisans and any other person for training them in different services (such as Store-keeping, Book- keeping and Accountancy, costing, Salesmanship, Servicing, Labour Laws, Industrial Laws, Taxation Laws, etc.) and to undertake any other training programme for self-employment and generation of employment opportunities.

(iv) to conduct or sponsor research to extend sharpen and bring up to date the know-how in the field of entrepreneurship development and to undertake or sponsor research in techniques of industrial development including evaluation of State's development schemes.

(v) to set up training centres for entrepreneurship development at various places in the State of Bihar and elsewhere.

(vi) to provide consultancy services independently or in association with any expert, institution or agency, in the field of selection of entrepreneurs, organising and conducting entrepreneurship development programmes training of the Trainers for conducting entrepreneurship development programmes and holding, sponsoring seminars, conference and Workshops on various aspects of entrepreneurship development programmes.

(vii) to run technical workshops and laboratories and industrial clinics for training and counselling of potential and existing entrepreneurs and for conducting research and dissemination of information and know how.

(viii) to establish, maintain, manage and rent out therein, production-cum-training centres, common facility centres, workshops, halls, hostels and any institution run by Government or any other organisation.

(ix) to prepare syllabus of training courses and to hold examinations or tests and confer diplomas or grant certificates to the trainees.

(x) to conduct training programmes, seminars, workshops conferences, etc. for any institution of groups of individuals directly or indirectly associated with policies and programmes of entrepreneurship promotion and development.

(xi) to conduct market survey for various classes of product so as to enable the entrepreneurs to select the product to be manufactured and to sell their products manufactured.

(xii) to provide motivation training to persons, institutions, community groups or the like with a view to develop entrepreneurial attitude among people.

(xiii) to assist and co-operate with any other body as may be decided by the Governing Body in furtherance of the objects of the Institute.

(xiv) to co-ordinate with various financial Institutions for effective implementation of these schemes by providing term loans and working capital to the entrepreneurs.

(xv) to co-ordinate with the various agencies of the Central Government, State Government and their public sector undertakings and corporations for effective implementation of the projects by providing necessary infrastructure facilities, marketing assistance, raw materials supplies, fiscal and nonfiscal assistance and concessions and other assistance to entrepreneurs.

(xvi) to publish leaflets, books, journals, project-literature and other reading materials so as to provide training to the entrepreneurs and disseminate information regarding the promotion and development of entrepreneurship.

(xvii) to maintain and run and up-to-date library and documentation facility, audio visual aids and any other research and training instruments.

(xviii) to conduct any programme in co-ordination with the State Government or Central Government or any Industrial or other organization in furtherance of the objects of the Institute.

(xix) to establish co-ordination with Entrepreneurship Development Institute of India (EDII), Ahmedabad and other similar institutions.

(xx) to borrow, raise or secure the payment of money in such manner as the Institute shall deem proper or convenient for furtherance of the above objects and, in particular, by the issue of bonds, debentures, bills of exchange, promissory notes or other obligations or securities of the Institute and to purchase, redeem or pay off any such obligations or securities.

(xxi) to accept and to give any grants, gifts, donations and subscriptions in furtherance of the objects of the Institute.

(xxii) to purchase, accept as a gift or otherwise acquire and own or take or lease or hire, temporarily or permanently, any movable or immovable property necessary or convenient for the furtherance of the objects and activities of the Institute and to deal with the same in any manner whatsoever.

(xxiii) to sell, assign mortgage, lease, exchange and otherwise transfer or dispose of, turn to account or otherwise deal with all or any of the property, movable or immovable, of the Institute as may be necessary or convenient for the working of the Institute.

(xxiv) to do all such things as are or may be necessary or incidental to, or conducive to the attainment of any of or all of the objects of the Institute."

Clause 5 is relating to definition (5 (b) is relating to Central Government) and other definitions for the purpose of present matter 5 (b) (c) (d) (e) and (g) which are necessary to take note of in the present case which reads as under (page 31):-

> "**5(b).** "Central Government" shall mean the Government of India.
>
> **(c).** "State Government" shall mean the Government of Bihar.
>
> **(d).** "Central Financial Institutions" shall mean 'Industrial Development Bank of India(IDBI)'. "The industrial Credit & Investment Corporation of India Limited (ICICI) and 'Industrial Finance Corporation of India (IFCI).
>
> **(e).** " State level Institutions" shall mean 'Bihar State Financial Corporation (BSFC)'-Bihar State Credit & Investment Corporation Ltd.(BICICO). Bihar Industrial & technical Consultancy Organization Ltd. (BITCO)' Bihar State Industrial Development Corporation (BSIDC)' and Lead Banks of the State. Etc.
>
> **(g).** "Sponsors" shall mean Central Financial Institutions, Government of Bihar, State level Institutions, Allahabad Bank and Bank of India."

Similarly, Item No. 6 and 8 of the Memorandum of Association reads as under:-

> "**6.** The Income and property of the Institute shall be applied towards the promotion of the objects as set forth in this Memorandum of Association subject in respect of grant made by the State/Central Government, to such limitations as the Government may from time to time, impose. No portion of the income and property of the Institute shall be paid or transferred directly or indirectly by way of dividends, bonus or otherwise howsoever by way of profits to the persons of who may at any time be or have been members of the Institute or to any persons through them, provided, that nothing herein contained shall prevent payment in good faith of remuneration in return for any service rendered to the Institute.

**8. Management:**

The Management of the affairs of the Institute is entrusted, In accordance with the Rules of the Institute to a Governing Body, first members of which are :

| SI. No. | Name | Occupation | Address | Designation |
|---|---|---|---|---|
| 1. | Shri S.V. Sharan, IAS | Service | Industrial Development Commissioner Govt. of Bihar, New Secretariat, Patna | Chairman |
| 2. | Shri K.C Saha, IAS | Service | Director (Industries) Govt. of Bihar, New Secretariat, Patna | Member |
| 3. | Shri G.S. Dutt, IAS | Service | Managing Director Bihar State Financial Corpn. Fraser Road, Patna | Member |
| 4. | Shri Anil Kumar, IAS | Service | Managing Director BICICO, S.P. Verma Road, Patna | Member |
| 5. | Dr. K.C. Varshney | Service | Dy. General Manager Industrial Development Bank of India Maurya Centre Fraser Road, Patna | Director |

The above members of the Governing Body shall remain in officer for a period of three years or for such other period as may be decided by their respective sponsors.

We, the several persons whose names and addresses are given hereunder subscribed, are desirous of being formed into a society under the Societies Registration Act XXI of 1860 in persuance of this Memorandum of Association.

| SI. No. | Name | Occupation | Address & Designation |
|---|---|---|---|
| 1. | Shri S.V. | Service | Industrial Development |

| | | | |
|---|---|---|---|
| | Sharan, IAS | | Commissioner Govt. of Bihar New Secretariat, Patna |
| 2. | Shri K. Roy Paul, IAS | Service | Commissioner, SSI, Govt. of Bihar, New Secretariat, Patna |
| 3. | Shri K.C. Saha, IAS | Service | Director (Industries) Govt. of Bihar New Secretariat, Patna |
| 4. | Shri. Anil Kumar, IAS | Service | Managing Director BICICO S.P. Verma Road, Patna |
| 5. | Shri P.R. Roy | Service | Director (Technical Development), Govt of Bihar New Secretariat, Patna |
| 6. | Shri K.C. Rikhi | Service | Asstt. General Manger Allahabad Bank, Patna |
| 7. | Dr. K.C Varshney | Service | Dy-General Manger IDBI, Maurya Centre, 1 Fraser Road, Patna |
| 8. | Shri P.S. Janeja | Service | Zonal Manager Bank of India R-Block, Patna |

Certain rules of the Institute is required to be taken note of. Rules 2, 4 and 6 governing body number of members and Rule 8 Chairman reads as under:-

> "2. **<u>Funds of the Institute :</u>**
> The funds of the Institute shall consist of the following:
> (a) Grants received from the Sponsors;
> (b) Grants received from Central and State Government or from any Foundations or any other national and international bodies;
> (c) Donations or contributions from persons or bodies;
> (d) Income from investments;
> (e) Income from other sources; and
> (f) Membership fee.
> 4. **<u>General Body & Membership :</u>**
> The General Body of the Institute shall consist for the time being of

the following three categories of members :

(a) Permanent Members :

Permanent Members will be the sponsors of the Institute.

(b) Institutional Members :

Institutional members will be those representing entrepreneurship development organizations, academic bodies, research institutions, corporate bodies, financial institutions, banks and other organizations set up by Government of India or by State Government, or other agencies for the purpose of promotion, financing and implementation of any programmes which have a bearing on entrepreneurship development, provided that each of them has made minimum contribution of such amount as may be prescribed by the Governing Body.

(c) Government Nominee Members :

Government nominee members will be those who may be nominated by the Central or State Government in connection with their contribution by way of grant or any other form of assistence.

6. **<u>Governing Body-Number of Members :</u>**

The Governing Body shall consist of not less than twelve and not more than fifteen members (inclusive of Chairman and Direcotor) as may be decided by the General Body from time to time. The composition of the Governing Body shall be as follows :

(I) The Central Financial Institutions, together shall have right to nominate 4 members of the Governing Body.

(ii) Sponsoring Commercial Banks viz. Allahabad Bank and Bank of India shall have right: to nominate one member each.

(iii) The State Government and the State level institutions together shall have right to nominate four members including the chairman of the Institute. The nominees shall be: Industries Development Commissioner, Director Industries, Managing Director of Bihar State Financial Corporation and Managing Director of Bihar State Credit and Investment Corporation.

(iv) Director of the institute shall be an ex-officio member of the Governing Body.

(v) Remaining member will be professionals to be appointed by the Governing Body.

The vacancy, if any, in the Governing Body shall be filled in by the Governing Body.

**8. Chairman :**

Industrial Development Commissioner, Government of Bihar shall be the Chairman of the Governing Body of the Institute and will be a nominee of the State Government."

10. In order to compare cited decision by the learning single Judge, it is necessary to reproduce Para 13 and 14 of ***Rajbir Surajbhan Singh Vs. Chairman, Institution Of Banking Personnel Selection, Mumbai*** cited (supra) which reads as under:-

"**13.** The objectives of the respondent Institute as per the Memorandum of Association are :

"(1) To establish and to carry on the administration and management of "Institute of Banking Personnel Selection".

(2) To plan, promote and provide for competent, well-qualified and efficient cadres of personnel and various levels to the banks and financial institutions in the country on a scientific basis.

(3) To render assistance in organizations in the areas of personnel such as recruitment, selection, placement, by designing, developing and printing suitable measurement test/tools, assessment of answer papers and processing results of examinations, and conduct such examination related services, on request.

(4) To carry out theoretical and applied research in the subjects of psychology and education."

**14.** One of the functions to achieve the said objects of the respondent Institute is to:

"Undertake to conduct on behalf of banks or financial institutions or other organization a total or partial selection project for recruitment or promotion involving all stages like designing and release of advertisement, receipt and screening of applications, conduct of examination, processing of results, etc."

11. To determine whether an institution fall under the definition of Article 12 of the Constitution, is required to be examined with reference to the nature of duties of the institution or a private organization to the extent as to what is the role played by the State/Government of India. Further whether Respondent- Institute falls under the definition of other authorities or not?

***INTRODUCTION***

*The Constitution of India had followed the U.S. precedent and enacted Fundamental Rights in the Constitution itself. The United States Constitution has defined its legislative and executive powers in two Articles, which makes* *it easier to define their correlation. However, the Indian Constitution being an elaborative one, it is difficult to correlate the legislative and executive powers because those powers are to be found in widely separated parts of our Constitution (i).*

***MEANING OF STATE UNDER ARTICLE 12 OF THE CONSTITUTION OF INDIA***

*The term "State" is defined under Article 12 of Part III (Fundamental Rights) of the Constitution of India.*

*It states that: In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each States and all local or other authorities within the territory of India or under the control of the Government of India (ii). The definition in Article 12 is only for the purpose of application of the provisions contained in Part III. Hence, even though a body of persons may not constitute 'State' within the instant definition, a writ under Article 226 may lie against it on non-constitutional grounds or on grounds of contravention of some provision of the constitution outside Part III, e.g., where such body has a public duty to perform or where its acts are supported by the State or public officials[iii].*

*In Ujjain Bai v. State of U.P. (iv) the Supreme Court observed that Article 12 winds up the list of authorities falling within the definition by referring the "other authorities" within the territory of India which cannot, obviously, be read as ejusdem generic with either the Government or the Legislature or Local authorities. The word "State" is of wide amplitude and capable of comprehending every authority created under the statute and functioning within the territory of India. There is no characterization of the nature of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement* *those laws.*

*The preponderant considerations for pronouncing an entity as a State agency or instrumentality are:*

*1. financial resources of the sta*te *bring the Chief finding source;*

*2. the functional character being governmental in essence;*

*3. Plenary control residing in government; prior history of the same activity having been carried on by the government and made over to the new body;*

*4. Some element of authority or command. Whether the legal person is a corporation created by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium (v).*

***SCOPE OF ARTICLE 12***

*When the body is financially, functionally and administratively dominated by or under the control of the government and such control is particular to the body and is pervasive, then it will be "State" within Article 12. If the control is merely regulatory, it will not be a State (vi)*

***UNLESS THE CONTEXT OTHERWISE REQUIRES***

*The context of a provision in Part III may exclude the meaning given by Article 12 to the word 'State', For instance, the expression 'security of the State' in Article 19 (2) refers not to the persons carrying on the administration of the State but to the State as an organized political society.*

***INCLUDES***

*This word indicates that the definition is not exhaustive. Hence, even though the definition expressly mentions on*ly *the Government and the Legislature, there might be other instrumentalities of State Action within the sweep of the definition.*

*The non-mention of the Judiciary does not, therefore, necessarily indicate that the courts are intended to be excluded from the definition (vii). The author is definitely of the opinion that by reason of the word 'includes' the definition of Article 12 enables the Indian Supreme Court to include within the definition all the three organs of the State (executive, legislative and judicial) as well included within the concept of State action in U.S.A., and that any narrowing down of the ambit of the definition would be defeating the object of inserting the definition of Article 12.*

***AUTHORITY***

*Literally 'authority' means a person or body exercising power or having a legal right to command and be obeyed. An 'Authority' is a group of persons with official responsibility for a particular area of activity and having a moral or legal right or ability to control others. If a particular cooperative society can be characterized as a "State" under Article 12, it would also be "an authority" within the meaning of Article 226 of the Constitution (viii).*

*"Authority" means a public administrative agency or corporation having quasi governmental powers and authorized to administer a revenue producing public enterprise. It is wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions (ix).*

*"Authority" in law belongs to the province of power. The word "State" and "Authority" used in Article 12 remain among "the great generalities of the Constitution" the content of which has been and continues to be applied by Courts from time to time (x).*

***LOCAL AUTHORITIES WITHIN THE TERRITORY OF INDIA***

*Local authorities are under the exclusive Control of the States, by virtue of entry 5 of List II of the 7th Schedule. That entry contains a list of some local authorities. This expression will, therefore,* *include a Municipal Committee; a Panchayat; a Port Trust; Municipality is a "State" within the meaning of Article 12. But that does not mean that the authorities are State Government or Central Government and there is a distinction between State and Government.*

*In Union of India v/s R.C.Jain (xi), to be considered a "local authority", an authority must fulfill the following tests-*

*1. Separate legal existence.*

*2. Function in a defined area.*

*3. Has the power to raise funds.*

*4. Enjoys autonomy.*

*5. Entrusted by a statute with functions which are usually entrusted to municipalities?*

***OTHER AUTHORITIES***

*It refers to authorities other than those of local self-government, who have the power to make rules, regulations, etc. having the force of law. "Instrumentality" and "agency" are the two terms, which to some extent overlap in their meaning. The basic and essential distinction between an "instrumentality or agency" of the State and "other authorities" has to be borne in mind. An "Authority" must be authority sui juris within the meaning of the expression "other authorities" under Article 12. A juridical entity, though an authority may also ratify the list of being an instrumentality or agency of the state in which event such authority may be held to be an instrumentality or agency of State, but not vice versa (xii).*

*In the case of R.D.Shetty vs. International Airport Authority (xiii), the Court laid down five tests to be considered "other authority".*

*1. Entire share capital is owned or managed by State.*

*2. Enjoys monopoly status.*

*3. Department of Government is transferred to Corporation.*

*4. Functional character governmental in essence.*

*5. Deep and pervasive State control.*

*6. Object of Authority.*

*In the case of Ajay Hasia v. Khalid Mujib Sehravardi (xvi), it has been held that whether a statutory body falling within the purview of the expression "other authorities" is to be considered differently. In the opinion of the minority, the tests laid down, in this case, are relevant only for the purpose of determining whether an entity is an "instrumentality or agency of the State".*

*In Electricity Board, Rajasthan v. The Supreme Court held that the expression "other authorities" is wide enough to include all authorities created by the Constitution or statute on whom the powers are conferred by Law. It is not necessary that the statutory authority should be engaged in performing the governmental or sovereign function.*

*In U.P. Warehousing Corporation v. Vijai Narain (xvi), It was held that the U.P. Warehousing Corporation which was constituted under a statute and owned and controlled by the Government was an agency or instrumentality of the Government and therefore "the State" within the meaning of Article 12.*

*In Som Prakash v. Union of India (xvii), the Supreme Court held that a Government company (Bharath Petroleum Corporation) fell within the meaning of the expression 'the State' used in Article 12.*

*The expression 'other authorities' will include all constitutional or statutory authorities on whom powers are conferred for the purpose of promoting economic activities. It is not only confined to statutory corporations alone but may* *include a government company, a registered society, or bodies which have some nexus with the government (xviii).*

*However, the important question that was raised before the Court was whether a private corporation fell within the ambit of Article 12. Unfortunately, the answer is yet to be decided.*

***WHETHER "STATE" INCLUDES THE JUDICIARY***

*The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-à-vis Part III of the Constitution. Bringing the Judiciary within the scope of Article 12 would mean that it is deemed capable of acting in contravention of Fundamental Rights. It is well established that in its non-judicial functions, the Judiciary does come within the meaning of State. However, challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior courts on the basis of a violation of fundamental rights, remains open to debate (xix).*

*On the one hand, the Judiciary is the organ of the State that decides the contours of the Fundamental Rights. Their determination of whether an act violates the same, can be right or wrong. If it is wrong, the judicial decision cannot ordinarily be said to be a violation of fundamental rights. If this were allowed, it would involve protracted and perhaps unnecessary litigation, for in every case, there is necessarily an unsatisfied party. On the other hand, not allowing a decision to be challenged could mean a grave miscarriage of justice, and go unheeded, merely because the fallibility of the Judiciary is not recognized.*

*The erroneous judgment of subordinate Court is subjected to judicial review by the superior courts and to that effect, unreasonable decisions of the Courts are subjected to the tests of Article 14 of the Constitution.*

*The Bombay High Court (xx) expressed the view that the Judgment of the Court cannot be challenged for violation of Fundamental Rights.*

*In the case of Naresh v. State of Maharashtra (xxi)*

*The issue posed before the Supreme Court for consideration whether the judiciary is covered by the expression 'State' in Article 12 of the Constitution. The Court held that the fundamental right is not infringed by the order of the Court and no writ can be issued to High Court. However, in yet another case, it was held that High Court Judge is as much a part of the State as the executive.*

*In Rati Lal v. State of Bombay, it was held that Judiciary is not State for the purpose of Article 12. But supreme Court in cases of A.R. Antulay v. R.S.Nayak and N.S.Mirajkar v/s. State of Maharashtra, it has been observed that when rulemaking power of Judiciary is concerned it is State but when exercise of judicial power is concerned it is not State.*

*In Amirabbas v. State of M.B., the Court made the following observation: Denial of equality before the law or the equal protection of the laws can be claimed against executive or legislative process but not against the decision of a component tribunal.*

*The scope of challenging a judicial decision on the ground of contravention of the fundamental right is much narrower in India for several reasons:*

*1. There being no 'Due Process' clause, there is no scope for challenging a judicial decision on a constitutional ground of unfairness.*

*2. The decisions of the Supreme Court being binding upon all Courts within the territory of India (Art. 141), there is no scope for a decision of the Supreme Court being challenged as violative of a fundamental right. But there is no reason why the decision or order of a subordinate* *court shall not be open to be questioned on the ground that it contravenes a fundamental right.*

*In fact, so far as the guarantee of equal protection in Article 14 is concerned, our Supreme Court, in the early case held that any State action, executive, legislative or judicial, which contravenes Article 14 is void.*

*But the Supreme Court limited the application of Article 14 to judicial decisions by the qualification that they will hit by the Article only when they involved a 'willful and purposeful discrimination'.*

*However, in the landmark case of Rupa Ashok Hurra v. Ashok Huna (xxii), the Constitution Bench of five judges examined whether a writ petition can be maintained under Article 32 to question the validity of a judgment of this Court after the review petition has been dismissed. Firstly, it was contended that there would be a re-examination of the case only where the judicial order was passed without jurisdiction, in violation of the principles of natural justice, in violation of fundamental rights or where there had been a gross injustice, under the inherent jurisdiction of the Court. It was admitted that, in the rarest of rare cases, a petition under Article 32 could be entertained where even a review petition had been rejected.*

*The "corrective jurisdiction" of the Court, it was argued, arose from those provisions of the Constitution conferring power on the Supreme Court such as Article 32 and Articles 129-40. Secondly, the remedy for the above rare cases was, since no appeal lies from the order cases was, since no appeal lies from the order of the Apex Court, an application under Article 32, if Senior Counsel were able to discern some permissible ground for the same. In this case, justice Syed Shah Mohammed Quadri pointed out that Article 32 can be invoked only for the purpose of enforcing the fundamental rights conferred in Part III and that no judicial order passed by any superior court in judicial proceedings can be said to violate any of the* *fundamental rights, since superior courts of justice do not fall within the ambit of State or other authorities under Article 12 of the Constitution.*

*The Court adopted an unusual unanimous approach by holding that even after exhausting the remedy of review under Article 137 of the Constitution, an aggrieved person might be provided with an opportunity to seek relief in cases of gross abuse of the process of the Court or gross miscarriage of justice, because the judgment of the Supreme court is final. It was held that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment.*

*Several grounds were laid down whereby a "curative petition" could be entertained and a petitioner is entitled to relief ex debito justitiae. It could be used, for example in cases of violation of principles of natural justice, where the interested person is not a party to the lies and wherein the proceedings a Judge failed to disclose his connection with subject-matter or the parties giving scope for apprehension of bias. The petitioner would have to specifically mention the grounds on which he was filing the curative petition.*

***CONCLUSION***

*The preponderant considerations for pronouncing an entity as State agency or instrumentality are:*

*1. financial resources of the state being the Chief finding source;*

*2. Functional character being governmental in essence;*

*3. Plenary control residing in government;*

*4. prior history of the same activity having been carried on by government and made over to the new body;*

*5. some element of authority or command. Whether the legal person is a corporation created* *by a statute, as distinguished from under a statute, is not an important criterion although it may be an indicium.*

*The definition of State under Article 12 of the Constitution does not explicitly mention the Judiciary. Hence, a significant amount of controversy surrounds its status vis-à-vis Part III of the Constitution. Bringing the Judiciary within the scope of Article 12 would mean that it is deemed capable of acting in contravention of Fundamental Rights. It is well established that in its non-judicial functions, the Judiciary does come within the meaning of State. However, challenging a judicial decision which has achieved finality, under the writ jurisdiction of superior courts on the basis of violation of fundamental rights.*

*Formatted on 27th February 2019*

***FOOTNOTES***

*(i) H.M.Seervai, Constitutional Law of India: A critical commentary, 349 (4th ed).*

*(ii) D.J. De's Constitution of India, Asia Law House, 133 (1949)*

*(iii) Durga Das Babu, Commentary Constitution of India, 635, (8th Edition 2007)*

*(iv)AIR 1962 SC 1621*

*(v) Som Prakash v. Union of India, AIR 1981 SC 212*

*(vi)Pradeep Kumar Biswas v. Union of India, (2002) 5 SCC 111.*

*(vii) Ibid*

*(viii) K. Morappan v. Dy. Registrar of Co-operative Society; (2006) 4 MLJ 641*

*(ix)Rajasthan State Electricity Board v. Mohan Lal, AIR 1967 SC 1857*

*(x) Pradeep, supra note 6*

*(xi)State of Gujarat v. Shantilal, Air 1969 SC 634 (643)*

*(xii) Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC*

*(xiii) 1979 SCR (3) 1014*

(xiv) (1981) 1 SCC 722

*(xv) AIR 1967 SC 1857 20 (1980) 3 SCC 459*

*(xvi) (1987) 3 SCC 395*

*(xvii) AIR 1981 SC 212 11*

*(xviii) Dr. J.N.Pandey's The Constitution of India 48th Ed., Central Law Agency, Pg. No.62-63*

*(xix) Article by Kalyani Ramnath, guarding the guards: The Judiciary As State Within The Meaning of Article 12 of The Constitution 13*

*(xx) In Ratilal v. State of Bombay, AIR 1953.*

*(xxi) 2 1966 (3) SCR 744*

*(xxii) (2002) 4 SCC 388"*

12. In the light of the aforesaid provision of law, we have to take note of various provisions from the Memorandum of Association and rules of the Institute cited (supra). Para 4 and 8 of the Memorandum of Association of the Institute suffice to hold that Institute would fall under the definition of Article 12 of the Constitution for the reasons that post of the Chairman of the Institute is held by an IAS officer who was holder of the post of Industrial Development Commissioner government of Bihar. Further, Director

( Industry), Government of Bihar. Rule 2 of Institute deals with the funds of the Institute in terms of Rule 2(b) provides for grants received from Central or State Government or any other national or international bodies. In other words, State of Bihar is granting certain amount (grants). That apart, it is noticed that in order to establish the Institute the State of Bihar has provided land to the Institute. In other words, both grants as well as providing land to the Institute is a State largess. Once the State largess is dispensed to a particular institute or organization, in that event State has a role including some control over the Institute, which suffice that Respondent- Institute would fall under the definition of Article 12 of the Constitution. Therefore, the Institute of Banking Personnel Selection, Mumbai (***Rajbir Surajbhan Singh Vs. Chairman, Institution Of Banking Personnel Selection, Mumbai***) decision is distinguishable with reference to Memorandum of Association- objects and other provisions read with rules of the Institute cannot be compared with functioning of Institution Of Banking Personnel Selection, Mumbai, so as to held that Respondent- Institute would not fall under the definition of Article 12 of the Constitution in the light of Apex Court's decision cited (supra).

13. Accordingly, we hold that learned single

Judge has committed error in holding that the writ petition is not maintainable in the light of Article 12 of the Constitution read with ***Rajbir Surajbhan Singh Vs. Chairman, Institution Of Banking Personnel Selection, Mumbai*** case. We hold that writ petition is maintainable in the light of the above analysis of factual aspects read with Article 12 of the Constitution.

**Merits:-**

Question for consideration is whether acceptance of resignation on 19.07.2002 on the same day is permissible even assuming that appellant has given his consented resignation letter or not? Annexure- C to the writ petition is the resignation letter dated 19.07.2002 which reads as under (page 79 of the writ petition):-

> "To,
>
> The Executive Director
>
> Institute of Entrepreneurship Development,
>
> Bihar, Patna-800001
>
> Sub: My resignation from service of this Institute w.e.f. 01.04.03.
>
> Dear Sir,
>
> With reference to above noted subject I am to inform you that I have planned to leave This Organization w.e.f. 01.04.03, subject to clearance of my dues salary, encashment of my

earn leave and payment against expenses on account of programmes/ activities etc.

In the meantime I shall like to complete my all pending assignments with this Institute. So that the Institute may not suffer in any way.

Thanking you,

Sincerely Yours

(Gyan Prakash)

Training Faculty"

14. In order to examine the aforesaid communication of the appellant in respect of resignation and its acceptance, it is necessary to reproduce Regulation No. 20 of Regulations, 1989, which reads as under (Page 51 of the writ petition):-

"**20.**<u>**Termination of Employment :**</u>

(1) The employment of a confirmed employee may be terminated by three months' notice or pay in lieu of, notice thereof.

(2) The employment of a probationer or a contract employee may be terminated by one month's notice or pay in lieu of the period of notice.

(3) The order of termination of an employee shall be made in writing by the Director or a duly authorized officer on his behalf.

(4) If any permanent employee desires to leave the service of the

> Institute he shall give three months' notice in writing to the Director or to the duly authorized officer, whereas an employee on probation/contract will give 1 month notice if he desires to leave the services of the Institute."

15. Learned counsel for Respondent- Institute submitted that appellant's matter is covered by Sub-regulation (1) of Regulation 20 and it was resisted by the learned counsel for the appellant that it would fall under Sub-regulation (4) of Regulation 20.

16. Having regard to the contents of the resignation letter dated 19.07.2002, It is a clear case that it would fall under Sub-regulation (4) of Regulation 20 and not Sub regulation (1) of Regulation 20. In terms of Sub-regulation (4) of Regulation 20, three months notice is required to be given in writing to the Director or to the duly authorized officer. In the present case appellant in his resignation letter 19.07.2002 has made it clear that resignation is required to be accepted to leave the Organization w.e.f. 01.04.2003. On the other hand, official respondent of the Institute who has accepted the resignation letter dated 19.07.2002 on the same day and relieving the appellant is contrary to Sub-regulation (4) of Regulation 20. In other words, official respondent of the Institute should have waited for three months and he should

have informed the appellant that his resignation *prima facie* would be accepted in terms of Sub-regulation (4) of Regulation 20. Therefore, the appellant has made out a *prima facie* case on merit that acceptance of resignation letter dated 19.07.2002 on the same date is in violation of Sub-regulation (4) of Regulation 20. Accordingly, acceptance of resignation letter dated 19.07.2002 is set aside.

17. The concerned official respondent of the Institute is hereby directed to grant 50% of the backwages from 1st August, 2002 till attaining the age of superannuation, with reference to either age of 58 or 60 depending upon the policy decision of the Institute. In respect of other services benefits are concerned, appellant is entitled to notional benefits. In other words, if he is entitled to increment from 2002-03 till attaining age of superannuation, the same shall be extended notionally. In other words, pay shall be re-fixed after extending the increment benefits and other benefits, if any.

18. After due calculation of the aforesaid service benefits, arrears amount shall be calculated along with 50% backwages and disbursed within a period of 4 months from the date of receipt of this order. Failing which appellant is entitled to interest @ 6% per annum from the date of filing of

writ petition.

19. Accordingly, order of the learned single Judge dated 30.08.2019 passed in C.W.J.C. No. 3344 of 2003 is set aside. The present L.P.A. stands allowed.

**(P. B. Bajanthri, J)**

**( Rajiv Roy, J)**

rakhi/Shoaib

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| **AFR/NAFR** | |
| **CAV DATE** | |
| **Uploading Date** | 12.10.2022 |
| **Transmission Date** | |