

(2019) 07 KAR CK 0057

In the Karnataka High Court

Case No : Writ Petition No. 28348 Of 2014 (S-DE)

Agrahara Krishnamurthy

APPELLANT

Vs

Sahitya Akademi

RESPONDENT

Date of Decision : 26-07-2019

Acts Referred:

Constitution Of India, 1950 — Article 4, 12, 19(2), 32, 226, 226(1A)

Citation : (2019) 07 KAR CK 0057

Hon'ble Judges : P.B. Bajanthri, J

Bench : Single Bench

Advocate : Gautamaditya, Lavanya Koushik, P.S.Rajagopal, Raghavendra G.Gayathri

Judgement

1. In this petition, petitioner has assailed the order dated 13.11.2013, Enquiry Officer's Report dated 26.8.2013 vide Annexures-A and B and order dated 3.6.2014 vide Annexure - C.

2. Respondent/Sahitya Akademi had a history how it was constituted. The object behind constituting National Akademi of Letters in India was considered by the Colonial British Government and in 1994, a proposal from the Royal Asiatic Society of Bengal in the formation of "National Cultural Trust" was, in principle, accepted. The original plan conceived of three institutions, or academies, devoted to the visual arts, performing arts and letters. The independent Government of India carried out its proposal, constituting a National Akademi of Letters called 'S Respondent/Sahitya Akademi' by a Government Resolution on 15.12.1952. It was formally inaugurated on 12.03.1954 in New Delhi. A ceremony was held in the Indian Parliament's Central Hall, wherein speeches were rendered by Maulana Abul Kalam Azad and S.Rakhakrishnan had initially functioned under executive order but was subsequently registered as a society under the Indian Societies Registration Act, 1860. The constitution of the Respondent/Sahitya Akademi provides that it will be run by three authorities viz., a General Council, an Executive Board and a Finance Committee. The General

Council is empowered to elect President and Vice President, from a panel of three candidates chosen by Executive Board. In addition to these, the Executive Board appoints a Secretary, who functions as both the Secretary of the Akademi and as an ex-officio Secretary of all three governing bodies. Elect President and Vice President in Delhi and has various Regional Offices across the Country to perform its functions.

GENERAL COUNCIL

The General Council of the Sahitya Akademi operates for a term of five years, following which it is reconstituted. It meets once a year and performs several important functions, including appointing the Akademi's President and Vice President, electing members of the Executive Board, framing rules and procedures for the Akademi and electing fellows on the recommendation of the Board. The General Council consists of the following members:

The President and the Financial Advisor: -

Five persons nominated by the Government of India, including one each from the National Book Trust, Department of Culture and Ministry of Information and Broadcasting.

? One person from each state and union territory in India (these are to be nominated by the outgoing General Council, based on recommendations from the states and union territories)

? One person to represent each language supported by the Sahitya Akademi (nominated by the outgoing General Council)

? A representative each, from a maximum of 20 universities, with post-graduate departments in the humanities (selected by the outgoing Council)

? Eight other persons from the field of letters (nominated from by the outgoing General Council)

? Representatives from the Sangeet Natak Akademi, the Lalit Kala Akademi, the Indian Council for Cultural Relations, the Raja Rammohun Roy Library, and a representative from an Indian publisher based on recommendations from publishers' associations.

Executive Board

The Executive Board of the Sahitya Akademi exercises executive authority and is responsible for supervising and controlling the Akademi's work. It prepares the Akademi's annual budget, appoints the secretary, and prepares panels of nominees for the General Council to consider and select fellows. It consists of the president, the vice-president, the financial advisor, two of the Government of India's nominees in the General Council (one of whom must represent the Ministry of Culture) and one person to represent each of the Akademi's supported languages, as nominated by the General Council.

Finance Committee

The Finance Committee's role is to prescribe the limit for total expenditure by the Sahitya Akademi in a financial year, and consider and recommend budget estimates to the Executive Board. The Finance Committee consists of a financial advisor, a nominee from the Government of India, a representative each from the General Council and Executive Board, and the vice-president of the Akademi. The accounts of the Sahitya Akademi are audited by the Auditor General of India.

Publications and activities

The Sahitya Akademi publishes several regular publications, in addition to its bi-monthly journal, Indian Literature. It undertakes bibliographic surveys, conducts translation workshops, seminars, and an annual festival of letters.

CONTROVERSIES AND PARLIAMENTARY COMMITTEE REVIEWS

Whilst enacting the Fundamental Rights in Part-II of our Constitution, the founding fathers showed that they had the will, and were ready to adopt the means to confer legally enforceable fundamental rights. The question that was required to be answered is as to against whom were the fundamental rights to be enforced? Broadly speaking, against "the State" not as ordinarily understood but as widely defines under Article 12 of the Constitution of India. It was constituted in the name of Sahithya Akademi Constitution pursuant to the resolution No.F.6-4/51 G2 (A) dated 15.12.1952 passed by the Government of India, Ministry of Education. Respondent Sahithya Akademi was constituted vide Annexure-B. Further, bye-laws have been framed called bye-laws of Sahithya Akademi (Annexure-C). Petitioner was appointed as Deputy Secretary, Southern Regional Office in the year 1986. Thereafter, he was appointed as a Secretary on 16.5.2006. Petitioner has attained the age of superannuation and retired from service on 30.1.2013. While he was in service, he was subjected to Disciplinary proceedings, which was initiated in the month of November 2012 and it has attained finality in imposing penalties on 03.06.2014. Thus, petitioner feeling aggrieved and dissatisfied with the issues and 2nd show cause notice along with the enquiry officer's report and imposition of penalties is presented this petition.

3. Learned counsel for the petitioner pursuant to the statement of objection filed on behalf of the respondents argued issues relating to territorial jurisdiction, maintainability of writ petition to the extent that respondent - Akademi do not fall under Article 12 of the Constitution and further, in the absence of statutory rules under Article 226 in respect of contract service writ is not maintainable. Learned counsel for the petitioner in respect of territorial jurisdiction is concerned, has pointed out that petitioner's initial appointment was in Bengaluru and respondent-Akademi has a regional office in Bengaluru. Further, as on the date of imposition of penalty, petitioner was already retired and settled in Bengaluru. Therefore, service of penalty order is at Bengaluru. Hence, cause of action in respect of impugned orders would lie in Bengaluru. Consequently, this Court has territorial jurisdiction.

4. Under the Head of Finance Committee at Item No.15(ii) relates to one nominee of Government of India not necessarily from among members of General Council. Under the Head of Audit at Item No.17 relates to Accounts of the Akademi shall be audited by the Auditor General of India.

5. Learned counsel for the petitioner submitted that in the statement of objections filed by respondents at para No.8 they have admitted. Further, with reference to bye-laws under Chapter III, pay and allowances has been adopted on par with the Government. Chapter VIII relates to 'Leave' and it contains All matters relating to leave of the employees of Akademi shall be governed by the Rules applicable to Central Government employees and the Akademi has adopted the Central Government Rules which are applicable to the Central Government Employees even in respect of pension and gratuity. It was also submitted that respondents who are party in the case of Dr.Vikram Singh Vs.Sahitya Akademi LPA No.289/2019 reported in (2010 SCC OnLine Del 2682), which was considered in Delhi High Court wherein, respondent did not raise issue relating to 'whether respondent-Sahithya Akademi would fall under Article 12 of the Constitution or not?' Thus, they have admitted in the case of Dr.Vikram Singh. It was further contended that in the case of A.R. Abdul Gaffar V. Union of India reported in ILR (2013) 1 Del 494, Court has considered under what circumstances an organization would fall under Article 12 of the Constitution. He relied on para Nos.8, 15, 24 and 26 respectively.

6. Learned counsel for the petitioner submitted that with reference to bye-law has no application to the petitioner in respect of imposition of penalty since he has attained the age of superannuation and retired from service before imposition of penalty in the year 2012. Clause - IV of 17 is with reference to bye-law relating to recovery of any pecuniary loss caused to the Akademi by negligence or breach of the rules or Bye-laws of the Akademi or orders or directions of Superior Authorities. There is no provision for recovery of any pecuniary loss from the retiral benefits in the absence of specific provision that any pecuniary loss could be recoverable from the pensionary benefits order of penalty is contrary with reference to bye-laws.

7. Per contra, learned counsel for the respondents submitted that in respect of territorial jurisdiction that charge memo, suspension order, notice, penalty and alleged conduct are all at New Delhi i.e. on 29.11.2012, 13.11.2013, and 3.6.2014 respectively. The above actions were taken place at Delhi therefore, territorial jurisdiction of this Court is not available to the petitioner merely that after his retirement he is residing at Bengaluru and at given point of time, he was appointed at Bengaluru. Further, learned counsel for the petitioner distinguished factual aspects of the present case with the Nawal Kishore's case *supra*.

8. With reference to para Nos.17 and 19 of the petition, he relied on the following decisions of Hon'ble Supreme Court :

- (i) AIR 2003 Calcutta 80 - IFB Automotive Seating and System Ltd., and Others Vs. Union of India (para Nos.34 and 41)
- (ii) (2010) 1 SCC 135 - Sonic Surgical Vs. National Insurance Company Ltd., (para Nos. 5,6 and 10)
- (iii) (2017) 11 SCC 335 - Alchemist Ltd., and Another Vs. State Bank of Sikkim and Others (para Nos.8, 9 and 10, 16, 20, 26, 27, 29, 35)
- (iv) ILR 1991 KA 4389 - S.I. Vasudevan Vs. Chief General Manager (para Nos.8 and 9)

These decisions are in support of that writ petition is not maintainable on the issue relating to territorial jurisdiction.

9. Relating to maintainability of writ petition with reference to Article 12, learned counsel for the respondent vehemently contended that except funding and participation of Government of India in the Respondent-Akademi, Akademi does not fall under Article 12 of the Constitution so as to treat the respondent-Akademi as a State. In support of the said contention, learned counsel for the respondent relied on the following decisions:

- 1. (2015) 4 SCC 670 - K.K. Saksena Vs. International Commission on Irrigation and Drainage and others (para Nos.47, 49, to 53)
- 2. AIR OnLine 2019 SC 252 - Rajbir Surajbhan Singh Vs. Chairman, Institute of Banking Personnel Selection, Mumbai (para No.6)
- 3. AIR Online 2019 SC 321 - Ramakrishna Mission and Anr. V. Kago Kunya and Ors.
- 4. 2005(3) SCC 413 - (para No.3)

10. Learned counsel for the respondent pointed out from para No.7 of the Statement of objections relating to non maintainability of writ petition with reference to Article 12 of the Constitution to the extent that respondent-Akademi would not fall under Article 12 and Akademi is not a State. He has also pointed out from the petition that page No.4 of para No.4 that respondent - Akademi would not fall under the State. Learned counsel for the respondent - Counsel also pointed out from the Constitution of Akademi and with reference to bye-law relating to Constitution of Akademi by the Government of India funds are being given by the Government of India, some where participation of the Government of India representatives in the Council.

Merely funding respondent-Akademi and participation of few members of the Government representatives does not attract that respondent - Institution would be a State with reference to Article 12 of the Constitution. Further, he relied on Supreme Court decision reported in (2002) 5 SCC 111 para Nos.40, 62 to 65 and 99. It was pointed out that Ajay Hasai Vs. Khalid Mujib Sehravardi reported in AIR 1981 SC 487 has been disclosed, re-written the definition of the Article 12 of

the Constitution. It was also pointed on the decision reported in 2007 (15) SCC 136 para Nos.11 to 20 and 22 and AIR Online 2910 SC 252 para No.6.

11. Learned counsel for the respondent further pointed out that petitioner is not entitled for relief against the second show cause notice and penalty order under Article 226 of the Constitution since with reference to loss caused to the respondent Akademi is with reference to contract service. Thus, petitioner has not made out a case on all the three counts.

12. In reply, learned counsel for the petitioner submitted that funds are being given by the Government of India, audit is also done by the Government of India. Representatives of the Government will be participating in the various council meetings and programs. In terms of functions of Secretary r/w service bye-law, respondent-Akademi is a State. He has reiterated that this Court has territorial jurisdiction that his initial appointment was in Bengaluru Regional Office. In the charge memo at Article 4, certain incidents relating to Bengaluru issues to the extent that petitioner was frequently visiting Bengaluru on official capacity for which he had prepared two reports justifying the expenses meted out on various dates. Those are all one of the charge in respect of initiation of enquiry.

13. Learned counsel for the petitioner pointed out from service bye-law which has considered while initiation of enquiry till imposing of penalty. More over respondent-akademi have adopted various Government of India Rules like Central Civil Services (Classification, Control and Appeal) Rules, 1957 leave rules, gratuity and pension. In view of these facts, respondent- Akademi falls under Article 12 of the Constitution.

14. Heard the learned counsel for the parties.

15. Core issues in the present petition are as under:

- (i) Whether petition is maintainable or not on the territorial jurisdiction issue.
- (ii) The respondent - Sahitya Akademi falls under the State definition under Article 12 of the Constitution or not?
- (iii) Whether petitioner's services rendered in the respondent - Sahitya Akademi was on contract service or not?

16. Cause of action means a right to sue. Therefore, the material facts which are imperative for the suitor to allege and prove constitute the cause of action. It is known fact that cause of action is not defined in any law or a statute. It has, however, been judicially interpreted inter alia to mean that every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his/her right to the judgment of the Court. Otherwise, it would mean that everything which, if not proved, gives the 5 of 13 respondent - defendant an immediate right to seek a judgment, would be part of cause of action. Of course, its importance is beyond any doubt. Consequently, every action, there has to be a

cause of action, if not, the plaint / petition, as the case may be, shall be rejected summarily.

17. Perusal of provision viz., clause 2 of Civil Procedure Code read with Article 226 (2) of the Constitution are in para materia. Entire bundle of facts pleaded need not constitute a cause of action as what is necessary to be proved before the petitioner can obtain a decree is the material facts. In other words, material facts would also be known as integral facts or factual aspects.

18. Article 226 of the Constitution as it originally stood had two- fold limitations on the jurisdiction of the High Courts with regard to their territorial jurisdiction. Firstly, the power could be exercised "throughout the territories in relation to which it exercises jurisdiction", that is to say, the writs issued by the court cannot run beyond the territories subject to its jurisdiction. Secondly, the person or authority to whom the High Court is empowered to issue such writs must be "within those territories", which clearly implied that they must be amenable to its jurisdiction either by residence or location within those territories.

19. Statement of objects and reasons to incorporate Article 226 (1A) now (2) reads as under:-

"Under the existing Article 226 of the Constitution, the only High Court which has jurisdiction with respect to the Central Government is the Punjab High Court. This involves considerable hardship to litigants from distant places. It is, therefore, proposed to amend Article 226 so that when any relief is sought against any Government or authority or person for any action taken, the High Court within whose jurisdiction the cause of action arise may also have jurisdiction to issue appropriate directions, orders or writs. The other new proposals are of a minor character"

20. Article 226 was amended while incorporating clause 2. Clause 2 reads as under:-

"(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories."

The effect of the amendment is that it made the accrual cause of action an additional ground to confer jurisdiction to a High Court under Article 226. Clause (2) would enable the High Court within whose jurisdiction the cause of action arises to issue directions, order or writs to any Government, authority or person, notwithstanding that the seat of such Government or authority or the residence of such person is outside territorial jurisdiction of the High Court. Writ can be issued by a High Court against a person, Government or authority residing within the jurisdiction of that High Court, or within whose jurisdiction the cause of

action in whole or in part arises. It is necessary to take note of what is the meaning of cause of action. After the insertion of clause (1-A), re-numbered as "2" to Article 226 of Constitution, now the jurisdiction of a High Court can be invoked if the cause of action arises, wholly or in part, within the territorial 7 of 13 jurisdiction of that High Court. However, the expression "cause of action" has neither been defined in the Constitution nor in the Code of Civil Procedure, 1908.

21. Learned counsel for the petitioner submitted that petitioner was appointed in the Regional Office, Bengaluru as a Deputy Secretary and later on appointed as a Secretary at New Delhi. While he was in service, on certain allegations disciplinary proceedings were initiated. During pendency of the disciplinary matter, he has retired on 31.01.2013 whereas penalty was imposed in a disciplinary matter after his retirement. It was further contended that he has settled in Bengaluru and he is in receipt of penalty order at Bengaluru under Article 4 of the Charge Memo, allegations relating to incidents of Bengaluru. In this back drop, this Court has territorial jurisdiction.

22. On the other hand, counsel for the respondent/Akademi while resisting the petitioner's contention submitted that charge memo, suspension order, notice, penalty and alleged conduct are all at New Delhi from 29.11.2012 to 03.06.2014. Therefore, merely petitioner had settled at Bengaluru after his retirement and communication of penalty order is at Bengaluru address, do not give him right to file the present petition in this Court. Both counsel relied on various decisions. Having regard to the decision in the case of Nawal Kishore Sharma *supra*, learned counsel for the respondent distinguished on factual aspects. It is to be noted that Article 4 of the charge memo relates to various alleged incidents relating to allegation that petitioner had undertaken official trips during which period he has misused respondent - Akademi's money and further, on the concluding of the disciplinary proceedings and imposition of penalty on the petitioner, he was at Bengaluru. Respondents could not expect a retired employee who is at Bengaluru to invoke jurisdiction at Delhi, merely on the score that charge memo, suspension order, notice and order of penalty were issued from the Head Office at Delhi. Certain cause of action has accrued at Bengaluru as is evident from Article 4 of the Charge Memo. It would be hard for the petitioner to go to Delhi and pursue his rights at Delhi High Court, that too at the evening of his life. In view of these facts and circumstances, to determine the territorial jurisdiction, facts of each case is required to be examined. Therefore cited decisions on behalf of respondent do not come in their aid. Accordingly, petitioner has made out a case on the issue of territorial jurisdiction. Hence, this Court has territorial jurisdiction in respect of the petitioner's grievance.

23. In support of territorial jurisdiction, learned counsel for the petitioner cited the following decision: Nawal Kishore Sharma Vs. Union of India & Others reported in 2014 (9) SCC 329 -

24. To contend that respondent-Akademi would fall under Article 12 of the

Constitution, he has pointed out with reference to documents namely Constitution of Sahithya Akademi (Annexure-B). Opening sentence starts with "As embodied in the Government of India, Ministry of Education Resolution No.F.6-4/51 G2(A) dated the 15th December, 1952 and as amended from time to time". It was further contended that under clause - 10 relates to General Council. Item No.(iii) of clause - 10 reads as under:

(iii) five persons nominated by the Government of India of whom one each shall be a representative of the Department of Culture, the Ministry of Information and Broadcasting and the National Board Trust and two shall be other nominees;

25. To determine whether an institution or private parties 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/Government. Further, whether respondent/Akademi 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 (H.M.Seervai, Constitutional Law of India: A critical commentary, 349 (4th ed).

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 (D.J. De's Constitution of India, Asia Law House, 133 (1949). 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[Durga Das Babu, Commentary Constitution of India, 635, (8th Edition 2007]

In Ujjain Bai v. State of U.P. (AIR 1962 SC 1621) 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 state 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 (*Som Prakash v. Union of India*, AIR 1981 SC 212).

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

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 only 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 (*Ibid*).

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

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

"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 (Pradeep, supra note 6).

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 (State of Gujarat v. Shantilal, Air 1969 SC 634 (643)), 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 (Pradeep Kumar Biswas v. Indian Institute of Chemical Biology, (2002) 5 SCC 111).

In the case of R.D.Shetty vs. International Airport Authority (1979 SCR (3) 1014), 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 (1981) 1 SCC 722, 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 (AIR 1967 SC 1857 20 (1980) 3 SCC 459), 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 (AIR 1981 SC 212 11), 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 (Dr. J.N.Pandey's The Constitution of India 48th Ed., Central Law Agency, Pg. No.62-63).

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

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 (In Ratilal v. State of Bombay, AIR 1953.) 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 (2 1966 (3) SCR 744)

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* ((2002) 4 SCC 388), 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 case 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 funding 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 one created 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

26. Constitution of the Government of India, Ministry of Education passed a resolution on 15.12.1952, in the General Council, State is

represented like five persons nominated by Government of India of whom one each shall be representative of the Department of Culture, Ministry of Information and Broadcasting and National Book Trust and two shall be other nominees. Further, one person from each of the States/Union Territories enumerated in the Constitution of India. Further, a panel of maximum three names recommended by the State/Union Territory's Akademi and whether there are no State/Union Territory's Akademi or whether there are more than one State/Union Territory Akademi by the State/Union Territory administration. The nominees shall be eminent persons in the field of letters and not functionaries of the Government or Union Territory Administration. Under the head of 'Finance Committee', one nominee of the Government of India, not necessarily from among members of the General Council under the head of 'Audit, Accounts of the Akademi' shall be audited by the Auditor General of India.

BYELAWS

Chapter 1 of Byelaw appointing authority definition is in relation to any post under the Akademi, means Authority competent to make appointment under the recruitment rules approved by the Executive Board.

Controlling authority means, the Executive Board in relation to the post of Secretary.

In the present case, matter relates to Secretary. Method of recruitment - Recruitment to every post shall be made in accordance with the recruitment rules approved by the Executive Board. If, for any reasons, a temporary vacancy arises in any post, the duties of that post may be assigned to another employee who is in the same scale of pay by the Secretary; provided that in the case of Deputy Secretary level officers, the Secretary shall seek an approval of appointment. However, appointment of contract shall be made for such a period and on such terms as the Executive Board may decide.

27. For contract recruitment - For all group 'A' to 'C' posts through approval or group 'D' through employment exchange, such of those appointees or on probation and confirmation. Under the 'Head of Retirement' - an employee shall retire from service of the Akademi on his attaining the age of superannuation applicable to employees of the Akademi in pursuance of orders of the Government etc.

Chapter 3 deals with pay and allowances: -

Scale of pay, initial pay and increment shall be prescribed by the Government from time to time. In respect of initial pay and increment, the employees of the Akademi shall be governed by the same Rules as are applicable to Central Government employees.

Under Chapter 9 - Miscellaneous, provides for pension and gratuity - Every employee of the Akademi shall be entitled to pension and gratuity in accordance with the Rules of the Government of India in that behalf, holidays and service

books and character rolls are on par with the Rule or Practice of Government of India even to the extent of communication of adverse remarks, receipt of representation against such remarks and disposal of representation.

Residuary conditions of service: - Where there is no provision in the byelaws, in such an event, Executive Board after considering the recommendation of the Finance Committee shall decide whether employee is entitled to terms more favourable than those relating to a Central Government employee of a similar category.

27. Perusal of the documents various activities in respect of finance issues are concerned, matter is being discussed with the Ministry of Culture. In fact, one Sri Pramod Jain, Joint Secretary, Ministry of Culture informed the Executive Board that the complete details along with the finance implications may be sent to the Ministry of Culture in respect of implementation of the Hon'ble Supreme Court of India's order with reference to Assistant/Stenographer decided in Writ Petition C.A.Nos.288-289/20015 with C.A.No.209/2007. Further, in respect of purchase of vehicle to the respondent- Akademi, Government of India, Ministry of Culture was consulted. In other words, control is vested with the Ministry of Culture, Government of India. That apart, learned counsel for the petitioner submitted that respondent did not raise any objection in respect of the matter in the case of Dr. Vikram Singh vs Sahitya Akademi before the Delhi High Court. Delhi High Court has considered the National Book Trust would fall under the definition of Article 12 of the Constitution having regard to the nexus between the trust and the Government and its activities whereas in the present case, Sahitya Akademi is better than the National Book Trust case in view of various involvement of the Ministry of Culture, Government of India in the respondent - Sahitya Akademi. In view of these facts and circumstances, this Court is of the view that respondent - Sahitya Akademi would fall under the definition of Article 12.

28. Issue No.3 is concerned learned counsel for the respondent contended that petitioner's relationship with the Respondent-Akademi is contract in nature. Therefore, no interference is called for in respect of imposition of penalty vide Annexures AB and AC dated 13.11.2013, 26.8.2013 and 3.6.2014 respectively. Whereas, counsel for the petitioner pointed out that petitioner was never appointed on contract basis so as to sustain the contention of the respondent. On the other hand, petitioner was appointed as a Deputy Secretary and further, he was appointed to the post of Secretary. The later appointment was made by the Executive Board and such appointment is against pay scale attached to the post. Service bye-laws (Annexure- C) do not provide for contract appointment. Service condition of each of the employee has been defined by chapter wise. If the petitioner was on contract basis there is no question of application of service Bye - laws and so also, invoking chapter IV of Service Bye-law relates to Conduct and Discipline. Para No.17 of the Bye-laws relates to Penalties. In fact, petitioner has been extended time to time revised pay including increments and other benefits on par with Central Government Employees so also, extending Central

Government Pay Rules. Thus, contention of the respondent that the grievance of the petitioner with reference to contract service has no substance.

29. Petitioner has attained the age of superannuation and retired from service on 31.1.2013, whereas penalty has been imposed on 3.6.2014 r/w show cause notice dated 13.11.2013 and copy of the enquiry report dated 26.8.2013. Before acting on enquiring officer's report, it is relevant to peruse the service Bye-laws Annexure-C of the respondent-Sahitya Akademi. Complete service Bye-laws are in relation to employee of the respondent-Akademi. Definition of Employee is under 3(e) under chapter - I - an 'employee' means a person serving in the Akademi in any post under the Akademi, having been appointed thereto either in pursuance of the recruitment Rules or in pursuance of a contract.

30. Petitioner was appointed to the post of Secretary as per Recruitment Rules by the Executive Board and he has attained the age of superannuation and retired from service on 31.1.2013 whereas para No.17 of chapter 4 relates to conduct and it has been r/w on penalties. Para No.17 reads as under:

Penalties 17. The following penalties may, for good and sufficient reasons and as hereinafter provided be imposed on any employee:

- (i) censure;
- (ii) withholding of increments or promotion;
- (iii) suspension;
- (iv) recovery of any pecuniary loss caused to the Akademi by negligence or breach of the rules or Bye-laws of the Akademi or orders or directions of superior authorities;
- (v) reduction to a lower grade or post or to a lower stage in a time-scale;
- (vi) compulsory retirement; and
- (vii) dismissal from service.

31. Reading of the aforesaid clause, it is crystal clear that respondent-Sahitya Akademi can impose any one of the penalty [17(i) to 17(vii)] (on any employee). Whereas in the present case, item (iv) has been invoked. The above penalty could be imposed only on any employee and not against retired employee. Bye-laws of the respondent-Akademi is not applicable to retired employee. No right is reserved by the respondent to take action against retired employee even in the case of initiation of enquiry while he was in service. In the absence of any specific statutory provision to take action against retired employee or imposing penalty, impugned order at Annexure - AC is without authority of law. Accordingly, it is to be set aside.

32. The cited decisions on all the three issues have been examined, principle laid down there in and factual; aspects of the present case are very relevant. Factors to determine territorial jurisdiction and Article 12 of Constitution is made out by

the petitioner.

33. The three issues namely territorial jurisdiction, respondent - Akademi falls under definition of Article 12 and petitioner's service condition is a contract service are hereby answered:

(a) This Court has territorial jurisdiction in view of factual aspects analyzed in the proceeding paragraphs.

(b) Petitioner was a Regular holder of the post of Secretary in terms of service byelaws of the Akademi and he was appointed against pay scale with reference to Central Government pay scale read with role of Ministry of Culture, Government of India. Respondent-Akademi would come under purview under Article 12 of the Constitution of India.

(c) Petitioner was regular holder of the post of Secretary with particular scale of pay. Various Government of India Rules and Executive orders are invoked in connection with service conditions, as is evident from Bye-law. Annexure-AB dated 13.11.2013 and Annexure-AC 3.6.2014 are set aside.

Accordingly, writ petition stands allowed.

In view of disposal of main matter, I.A.1/2015 stands disposed of.

No order as to costs.