

(1975) 05 DEL CK 0013

In the Delhi High Court

Case No : Civil Writ Appeal No. 276 of 1972

Y.P. Gupta

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 27-05-1975

Acts Referred:

Citation : (1975) ILR Delhi 453

Hon'ble Judges : Yogeshwar Dayal, J; V.S. Deshpande, J; V.D. Misra, J; T.V.R. Tatachari, J; S.S. Chadha, J

Bench : Full Bench

Advocate : Yogeshwar Prasad, S.K. Bagga, Rani Arora, B.N. Lokur, Urmila Kapoor and B.N. Kirpal, for the Appellant;

Judgement

V.S. Deshpande

(1) It is generally assumed that there is greater constitutional and legal assurance of fair treatment and security of tenure in the sphere of public employment than in private employment (except for "workman" under labour legislation). Employment under Government is par excellence, public. Article 12 of the Constitution, however, offers the protection of fundamental rights against the state which includes not only the Government but also Legislatures, local authorities and "other- authorities". Under Article 226 of the Constitution, writ petitions are maintainable not only against the Government but also against an "authority" for the enforcement of fundamental rights or any other purposes, i.e. enforcement of other rights.

(2) The tendency of the modern State (particularly in India) to regulate by or under legislation more and more activities gives a public character to these regulatory agencies. Questions have increasingly arisen as to what extent and for what purposes the employees of these new public bodies are entitled to the protection of Articles 14 and 16 of the Constitution, of the rules of natural justice and other reliefs which can be obtained in a writ petition.

(3) The Indian Council of Agricultural Research (I.C.A.R.) and the Indian Agricultural Research Institute (I.A.R.I. managed by it have in their employment a large staff including highly qualified scientists. The I.C.A.R. and the I.A.R.I. are in general sense public bodies. Their employees are, Therefore, in public and not in private employment. The question, the consideration of which necessitated this reference to a large Bench, is whether these employees have any constitutional or legal rights analogous to those of Government servants. The answer to this question would depend upon the status of these bodies which are their employers vis-a-vis Articles 12 and 226 of the Constitution and the extent to which the employment relationship is governed by the statute or statutory rules.

(4) The petitioners Dr. Y. P. Gupta and Dr. T. S. Raman in this and the connected writ petitions respectively (Civil Writs 2"76 and 669 of 1972) challenge the validity of the appointment of Dr. S. L. Mehta (Respondent 6) to the post of Senior Biochemist in the I.A.R.I which according to Dr. Gupta is a part of the I.C.A.R. and which according to Dr. Raman is governed and managed by the I.C.A.R.

(5) The appointment was made by Dr. M. S. Swaminathan (Respondent 4) in his capacity as the Director-General of the I.C.A.R. (Respondent 2) on the 10th March, 1972 on the recommendation of a Selection Committee of which Dr. M. S. Naik (Respondent 5) Head of the. Division of Biochemistry in the I.A.R.I. was a member. The various grounds on which the appointment was challenged were summarised in his argument by Shri Yogeshwar Prasad, learned counsel for the petitioners, as follows :-

A. That Dr. Swaminathan and Dr. M. S. Naik were biased against the petitioners and they acted bona fide against the petitioners in selecting Dr. Mehta for the post.

B. That Dr. Mehta, did not satisfy the essential qualifications for appointment to the post and

C. That the prescribed procedure for making the appointment was not followed.

(6) Dr. Gupta also seeks to quash the decision of the Academic Council of the Post Graduate School of the I.A.R.I. (Respondent 7) unanimously taken in their meeting held on May 3, 1971 removing Dr. Gupta from the membership of the Faculty of the Post Graduate School on the ground of bona fides of Dr. Swaminathan and also because Dr. Gupta was not given an opportunity to show cause why he should not be removed from the said body.

(7) The I.C.A.R. is alleged by the petitioners to be a part of the Department of Agriculture of the Government of India and the Union of India is made Respondent 1 because the Union Public Service Commission was not consulted in making the impugned appointment to the post of Senior Biochemist and on the allegation that Articles 14 and 16 of the Constitution were also contravened. No

counter affidavit has been filed by the Union of India. As will appear later no cause if action is shown to exist against the Union of India. It was justified, Therefore, in not filing the counter-affidavit in the defence. The I.C.A.R. has defended both the writ petitions. Dr. Swaminathan and Dr. Naik have filed personal counter-affidavits in the writ petition filed by Dr. Raman. Both the writ petitions have been heard together. Dr. Mehta has not chosen to file any counter-affidavit.

(8) In defense, the maintainability of the writ petition has been challenged and the allegations of bona fides on the part of Dr. Swaminathan and Dr. Naik, the allegation that Dr. Mehta was not qualified for appointment as a Senior Biochemist and the allegation that the procedure prescribed for the appointment was not followed were all denied.

(9) The questions which arise in considering the claims of the petitioners and the defense of the respondents may be set out as below:-

1. Do the petitioners have a legal right to challenge the appointment of Respondent 6 ?
2. Has the Director-General of the I.C.A.R. acted in contravention of any legal obligation in making the appointment of Respondent 6 ?
3. Was the said appointment vitiated by the bona fides of Dr. Swaminathan and/or of Dr. Naik ?
4. Was it had because of the want of qualifications of Dr. Mehta or non-compliance with the prescribed procedure in making it ?

(10) These writ petitions have been filed under Article 226. there under this Court has power to issue to any person or authority directions, orders or writs including writs in the nature of mandamus and certiorari for the enforcement of either a fundamental right or some other legal right. The existence of a legal right in the petitioners is, Therefore, the foundation of such a writ petition. The legal right, if any, possessed by the petitioners depends on their legal status vis-a-vis their employer.

(11) The I.A.R.I. was formerly a part of the Government of India, Ministry of Agriculture. By an executive resolution of May 23, 1929 the Government of India decided to establish an Imperial Council of Agricultural Research. In the same resolution it was also decided that the Council should not be constituted under an Act of the Imperial Legislature but should be registered under the Registration of Societies Act, 1860. In order to comply with the requirements of the Registration of Societies Act, a meeting of those who would constitute the Council was to be convened to consider the terms of Memorandum of Association and the Rules and Regulations to be filed with the Registrar of Joint Stock Companies. It is to be noted that the Government of India did not constitute the Council as an executive department and then convert it into a society. It was never a department of the Government. The Council consisted of representatives

from the various Provinces, Universities, Associations, etc., from all over India.. Being such a multiplex body it was necessary that it should have a permanent Secretariat at one place. By the resolution of August 4, 1930, Therefore, the Government decided that the Secretariat of the Council would be designated as the Imperial Council of Agricultural Research Department which should be a regular Department of the Government of India Secretariat, Department of Education, Health and Lands. A clear distinction was made between the Council which was a registered society and its Secretariat which became a, department of the Government of India. This was in keeping with the original distinction made in paragraph 7 of the resolution of May 23, 1929 by which the annual recurring grant of Rs. 7.25 lakhs was devoted as follows :-

(A) Rs. 5 lakhs to be devoted to the furtherance of the scientific objects of the Council and

(B) Rs. 2.25 lakhs to meet the cost of its staff and secretariat.

(12) Later, it was proposed by the Imperial Council of Agricultural Research Department on December 29. 1937 that the office of the said Department should be only an attached office and not a regular department of the Government. This was given effect to by the Government of India resolutions of January 5, 1939 and April 12, 1940. On this, the Vice-Chairman and the Secretary of the Council came to have dual capacities and also became Secretary and Deputy Secretary respectively to the Government of India. In order to place the Council on a more secure financial position unaffected by the financial vicissitudes of the Central Government, the Agricultural Produce Cess Act of 1940 was passed to ensure that the proceeds of the said cess would go straightaway to the Council. This was a legislative recognition of the existence of the Council as a body separate from that of the Government of India. By the notification of December 15, 1973 a Department of Agricultural Research and Education as a, part of the Ministry of Agriculture was formed to perform the administrative and governmental functions in relation to the I.C.A.R.

(13) The Rules framed by the I.C.A.R. at the time of its registration as a, society were amended from time to time. On January 10, 1966 we find that rule 18 of the said Rules which enabled the I.C.A.R. to maintain its own office, Research Institutes and laboratories and to appoint persons to posts under the society in accordance with its own recruitment rules was held in abeyance. This accorded with the fact that the office of the Council was a part of the Government and the I.A.R.I. as also some other Institutes were also under the Government. In pursuance of the resolution of the Government dated March 30, 1966 however, the Government of India transferred the I.A.R.I. along with 13 other Research Institutes till then working under the Government to the I.C.A.R. The persons employed in these Institutes such as Dr. Gupta as Government servants were, Therefore, placed at the disposal of the I.C.A.R. on foreign service without deputation allowance in accordance with Fundamental Rule 110(a). These persons were given an option either to continue as Government servants on

deputation to the I.C.A.R. or to abandon their status as Government servants and to become the employees of the I.C.A.R. On October 30, 1971 the Ministry of Agriculture informed the Accountant General, Commerce, Works & Miscellaneous, New Delhi, that upon the transfer of the administrative control of the I.A.R.I. to the I.C.A.R. (an autonomous semi-government organisation registered as a society) the posts at the I.A.R.I. became surplus to the requirements of the Government. These posts would, Therefore, continue only as "shadow" posts under the Department of Agriculture. At the time of the transfer of the I.A.R.I. to the I.C.A.R. it was stated that the moveable and the Immovable assets of the I.A.R.I. would be transferred to the I.C.A.R. by deeds of transfer. But such deeds have not yet been-executed and the assets, Therefore, continued to belong to the Government though the control and management of Institutes and the posts under the Institutes vested in the I.C.A.R.

(14) While Dr. Gupta has maintained his lien on a "shadow" post, Dr. Raman was recruited after the transfer of the I.A.R.I. to the T.C.A.R. and was appointed to the post in the I.A.R.I. by the I.C.A.R. Dr. Raman, Therefore, is an employee of the I.A.R.I. as governed by the I.C.A.R. and is not a Government servant at all.

(15) The final step was taken by the Government on March 30, 1974 when the Ministry of Agriculture wrote to the Secretary of the I.C.A.R. that rule 18 of the Rules of the I.C.A.R. shall come into force in its entirety with effect from April 1, 1974 and consequently the Secretariat of the I.C.A.R. shall cease to be an attached office of the Ministry of Agriculture and shall function as wholly financed and controlled by the society.

(16) It was contended for the petitioners that the I.A.R.I. remained a part of the Government despite the transfer because rule 18 of the Rules of the I.C.A.R. was not brought into force till March 31, 1974. Let us examine this contention. Fundamental Rule IIO(a) is as follows :-

"NO Government servant may be transferred to foreign service against his will ?

"PROVIDED that this sub-rule shall not apply to the transfer of a Government servant to the service of a body, incorporated or not, which is wholly or substantially owned or controlled by the Government."

What was the I.A.R.I. in 1966? It was the personnel who constituted the I.A.R.I. on the one hand and the assets of the Government devoted to the use of them by the staff of the I.A.R.I. on the other hand. The Government could legally transfer the staff of the I.A.R.I. to the I.C.A.R. in view of the proviso to Fundamental Rule IIO(a). Dr. Gupta was thus validly transferred to the control of the I.C.A.R. even though he retained his lien on "shadow" post in the Government. The transfer of the staff of the I.A.R.I. takes effect because of Fundamental Rule IIO(a) even if rule 18 of the I.C.A.R. Rules is in abeyance. Fundamental Rule IIO(a) which is a statutory rule prevailed over the abeyance of rule 18 of the Rules of the I.C.A.R. which is non-statutory.

(17) Further, even if the transfer is assumed to be invalid in 1966, it is valid from April 1, 1974. This would make the contention instructions before the Civil Writ is decided. It is well settled that this Court would not issue a futile writ. The fact that the assets used for the purpose of the I.A.R.I. have not yet been transferred to the I.C.A.R. does not detract from the validity of the transfer of the staff to the I.C.A.R.

(18) The learned counsel for the petitioners argued that the I.C.A.R. could not have a research institute of its own as long as rule 18 has held in abeyance. In our view, the power to have its own institutes was conferred on the I.C.A.R. by the relevant objects of its Memorandum of Association referred to below and could be exercised by it even in the absence of a specific rule to implement the object.

(19) What was the legal status of the petitioners when the writ petitions were filed? One of the objects set out in the Memorandum of Association of the I.C.A.R. was to undertake, aid, promote, and co-ordinate agricultural and animal husbandry education, research and its application in practice and to do all other such things as the society may consider necessary incidental or conducive to the attainment of the above objects. Why has a society as also a company to first set out in a Memorandum the objects of association? The reason is that a society as well as a company consists of members who organise themselves into a body voluntarily. The objects of the working of such a body have, Therefore, to be determined by the body itself. This is why the members who form the society have to subscribe their names to the Memorandum of Association u/s 1 of the Societies Registration Act, 1860 and the members who form a company have to sign the Memorandum of Association u/s 15 of the Companies Act, 1956. The constitution of a society is also determined by its members. This is done when the society makes its own rules which are also to be filed with the Memorandum of Association with the Registrar of Joint Stock company when the Articles of Association of a company are drafted and signed by the members of the company u/s 30 of the Companies Act, 1956. The constitution and the working of a society, as of a company, is, Therefore, entirely voluntary. The society like a company is a creation of its members. This is to be contrasted with a statutory body which is created by Parliament by passing a statute. While the power of a society or a company is their own, the power of a statutory body is derived from the State through legislation. This distinction is brought out by Ray, C.J., speaking for the majority in Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, . While a statutory body is created by a statute, a society or a company is created by its own members and is only registered or incorporated in accordance with the provisions of the Societies Registration Act and the Companies Act respectively. The learned Chief Justice has taken further the distinction between a registered society and a statutory body in the unanimous decision of the Constitution Bench in Sabhajit Tewary Vs. Union of

India (UOI) and Others, , which consider the legal status of the Council of Scientific and Industrial Research (C.S.I.R.). This body was better placed than the I.C.A.R. to be regarded as a part of the Government or as an "authority" within

(20) (1) Article 311 of the Constitution,(2) Industrial law,(3) "The Courts are also invested with the power, to declare invalid the act of a statutory body, if by doing the act the body has acted in breach of a mandatory obligation imposed by statute even if by making the declaration the body is compelled to do something which it does not desire to do".

(21) The petitioners are faced with two insurmountable difficulties in the way of their success. Firstly, Dr. Gupta under Fundamental Rule 110 (a) and Dr. Raman by his very appointment are employees of the I.A.R.I, and, Therefore, of I.C.A.R. The T.C.A.R. is only a registered society and not a statutory body. The I.A.R.I. is a part of the I.C.A.R. and is controlled and managed by it. Secondly, the petitioners have not shown that the I.C.A.R. was under any statutory obligation in this respect and has acted in breach of it.

(22) The reliefs asked for by the petitioners are in the nature of either a mandamus or certiorari. As was pointed out by Subba Rao, J. in Election Commission, India Vs. Saka Venkata Subba Rao and, (5), the High Courts in this country are in somewhat the same position as the Court of King's Bench in England was in issuing these writs. In T.C. Basappa Vs. T. Nagappa and Another, , this position was reaffirmed and it was stated that the High Courts and the Supreme Court could issue these writs "so long as we keep to the broad and fundamental principles that regulate the exercise of jurisdiction in the matter of granting such writs in English law". These writs are issued to protect either a fundamental right or some other legal right of the petitioner. As was observed in Mohammed Hanif Vs. The State of Assam, the jurisdiction of the High Court under Article 226 is a supervisory jurisdiction-a jurisdiction meant to supervise the work of the tribunals and public authorities and to see that they act within the limits of their respective jurisdiction. The remedy provided under Article 226 is a remedy against the violation of the rights of a citizen by the State or statutory authority. In other words, it is a remedy in public law.

(23) The petitioner Dr. Gupta is a Government servant while the petitioner Dr. Raman is not a Government servant but an employee of the I.A.R.I. which is a part of the I.C.A.R. But both of them stand on the same footing. It is true that the legal rights of a Government servant are more a matter of status than of contract Roshan Lal Tandon Vs. Union of India (UOI), . But the status of Dr. Gupta as a Government servant is confined to the "shadow" post in the Ministry of Agriculture on which he has a lien. But in the present writ petition, the post held by Dr. Gupta is under the I.A.R.I./I.C.A.R. and not under the Government. The post sought by him, namely, that of the Senior Biochemist is also under the I.A.R.I./I.C.A.R. The legal rights which Dr. Gupta as well as Dr. Raman have to show must be shown to relate to their character as employees of the I.A.R.T./

I.C.A.R. and the post sought by them under the I.A.R.I./I.C.A.R. This relationship between the petitioners and the I.A.R.I./I.C.A.R. is entirely contractual. Further, even the terms and conditions of the contract of employment are not defined. The I.C.A.R. is guided in making the appointments by what are called the bye-laws of the I.C.A.R. The Societies Registration Act requires only the Memorandum of Association and the Rules of the Society to be filed with the Registrar. To that extent, the statute at least recognises the existence of a Memorandum of Association and the Rules. The Memorandum and the Rules are, however, made by the society by private voluntary action. They are not made in pursuance of any power derived from a statute. But the bye-laws of the I.C.A.R. are not even recognised or mentioned in the Societies Registration Act. It is not known how they were made by the I.C.A.R. It would appear, Therefore, that the I.C.A.R. framed them only as a guide to its own internal management. They are comparable to administrative instructions issued by an organisation for its own internal functioning. If the organisation does not follow these administrative instructions, it does not break any law nor does it contravene any one's rights. For, it is not the intention of such bye-laws or administrative instructions to create "rights in third persons. It follows, Therefore, that they do not either create any rights in the petitioners nor are they enforceable at the instance of the petitioners.

(24) When the I.C.A.R. had to fill up the post of the Senior Biochemist, it could proceed to do so in any manner it liked. This is the legal position. But apart from law the I.C.A.R. is financed by the Government and is a responsible organisation which would not like to act arbitrarily. This is why it has made bye-laws and it attempts to act according to the bye-laws so as to inspire confidence in the public mind as to its impartiality. But if in doing so it commits any mistake then the way to correct the action of the I.C.A.R. is either political, administrative or legislative and not by way of resort to Courts. The Courts cannot exercise any control over the action of the I.C.A.R. except by enforcing the legal rights of the petitioners, if any. The position of the petitioners being that of mere employees, they have no legal rights as against their employer in the absence of any statutory element governing their employment. As it is, the employment is governed purely by a contract and not by any statute.

(25) Our answer to the first question, Therefore, is that the petitioners have no legal rights which are enforceable by way of writ petitions.

(26) Question NO. 2:-What is the legal obligation imposed on the I.C.A.R. which has been contravened by it so as to give a cause of action to the petitioners for a writ in the nature of mandamus ? The making of the appointment of the Senior Biochemist is in the power of the I.C.A.R. not because any statute says so but just because the post is under the control of the I.C.A.R. The filling up of the post is not governed by any statute or statutory rules. The procedure for filling it is governed only by the bye-laws. The qualifications to be fulfilled by the appointee are also prescribed by the I.C.A.R. in its administrative capacity. If

there is any mistake committed by the I.C.A.R. in discharging any of these functions it is only administrative in its nature. There is no question, Therefore, of any legal obligation which is sought to be enforced by the petitioners against the I.C.A.R. In *Praga Tools Corporation v. C.A. Imanuel* (1969) 3 S.C.R. 77, the writ petition of the workmen of a Government company seeking reinstatement was dismissed leaving the workmen to their remedies under the Industrial law. For, writ petition could not lie against a company which was neither "a statutory company" nor one having any public duties or responsibilities imposed upon it by any statute. At pages 778-779, the Court observed that the condition precedent for the issue of mandamus is that there is a legal right to the enforcement of the performance of a legal duty by the issue of the writ. The Court went on to observe at page 779 that :-

"IT is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or any official body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities."

On the other hand, in *Vidya Ram Misra v. Managing Committee. Shri Jai Narain College* (Supra), in paragraph 13, it was held that the writ petition could not lie against the Management of Shri Jai Narain College inasmuch as it was not a statutory body. The writ petition could lie only if the order was that of a statutory body acting in breach of a mandatory obligation imposed by a statute. Reading the two decisions together it would appear that the legal obligation must be imposed by a statute. In the present case, no such legal obligation is imposed on the I.C.A.R. by the Societies Registration Act which is sought to be enforced by the petitioners.

(27) Even if the I.C.A.R. were to be a statutory body or an "authority" within the meaning of either Article 226 or Article 12 of the Constitution, it would be still necessary that the legal obligation to be enforced by a writ petition should be a statutory one and the cause of action for the writ petition should consist in the contravention of some statutory provision or rule. For instance, in *Ved Prakash Malhotra Vs. State Bank of India and Another*, , the employer of the petitioner was a statutory authority. Nevertheless. the terms and conditions of the service of the petitioner were not regulated by any statute or statutory rule but merely by administrative instructions. It was held, Therefore, that the writ petition was not competent to enforce the breach of any such administrative instructions. A writ in the nature of mandamus cannot, Therefore, issue at the instance of the petitioners.

(28) Writs in the nature of certiorari and prohibition are issued according to the seminal decision in *R. v. Electricity Commissioners*, (1924)1 K. B. 171 ,

"whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially" acts in excess of their legal authority. It is well established after the decision in *P.D. Shamdasani Vs. Central Bank of India Ltd.*, that violation of a right (for instance of property) by private individuals is not within the purview of Articles 19, 31 and 32 of the Constitution. For the same reason it is not within the purview of Article 226 of the Constitution. The I.C.A.R., is not, Therefore, such a body of persons as is envisaged in the observation of Atkin L.J., in *R. v. Electricity Commissioners*.

(29) Neither certiorari nor prohibition would issue to a body which derives its jurisdiction from contract or to a voluntary association or domestic tribunal which derives its jurisdiction solely from the consent of its members (*S. A. de Smith, Judicial Review of Administrative Action, 3rd Edition, p. 341*). The I.C.A.R. is a voluntary association. Even if it may be conceivable that even a non-statutory body will be subject to writ jurisdiction if it is discharging public functions and acts contrary to some statute or statutory rule, no such contravention of statute or statutory rule has been brought home to the I.C.A.R. in this case. Nor has the I.C.A.R. determined any question which affects the legal rights of the petitioners. The selection of a candidate to fill the post of Senior Biochemist does not involve any duty to act judicially.

(30) The distinction between a private person or an association or a society or a company on the one hand and the Government or an authority on the other hand is this: The former sail on their own steam. The latter derive power from the State. It was argued for the petitioners that it is not necessary that the I.C.A.R. must be a statutory authority before it is made amenable to the writ jurisdiction of this Court. It was said that the I.C.A.R. is virtually the Government. For, it is financed by the Government, controlled by the Government and is subject to directions by the Government. The registration of the I.C.A.R. as a society is only on paper. In reality it should be regarded as a part of the Government. This argument may even be put higher as being based on substance of the matter rather than its form. It is an attractive proposition that it is the substance and not the form which should be given importance by this Court. This divorce between the substance and the form has assumed large proportions as the State has increasingly resorted to the creation of statutory bodies, companies and registered societies for discharging many functions which in their absence would have been discharged by the State itself. This has led to the unfortunate result that employees of the Government and the statutory authorities whose conditions of service are regulated by the Constitution, Statutes and Statutory Rules enjoy a certain amount of security of tenure while the employees of the registered societies and companies are deprived of such benefit. The functions discharged by the societies and companies may be no less public and no less important than those discharged by the Government and the statutory authorities. This anomaly was noticed by Mathew. J., in his concurring judgment in *Sukhdev Singh v. Bhagatram* (*Supra*).

(31) The learned Judge in his concurring judgment observed that "the need to subject the power centres to the control of Constitution requires an expansion of the concept of State action" as was done by the Federal Courts in the United States of America..." Several tests have been propounded to find out whether an action is private or State action". One is whether State aid is given to the individual action and State control is extended over it..... "Another factor which might be considered is whether the operation is an important public function..... In America, corporations or associations, private in character, but dealing with public rights, have already been held subject to constitutional standards" (Paragraphs 93, 95, 96, 97 & 101).

(32) Learned counsel for the petitioner relied upon these observations and urged that the action of the I.C.A.R. should be regarded as State action amenable to the writ jurisdiction of this Court under Article 226 of the Constitution and also for the purposes of Article 12 thereof. But this contention is negated by the following observation of Mathew, J. :-

"I also wish to make it clear that I express no opinion on the question whether private corporations or other like organisations, though they exercise power over their employees which might violate their fundamental rights, would be "State" within the meaning of Article 12." (paragraph 112).

The constitutional protection could be granted even against private persons and bodies in the United States of America on the ground that their action amounted to State action in view of the nature of the functions discharged by them and because the action affected the public in general and was not confined to private individuals. It was this approach of looking to the nature of the action and ignoring the nature of the actor that led to the evolution of the concept of "State action" in the United States of America. The situation under our Constitution is otherwise. In considering the application of Article 226 as also of Article 12 of the Constitution the Courts have to consider the nature of the authority whose action is complained of and is sought to be controlled through the Courts. The petitioners cannot seek to attract the applicability of these provisions by ignoring whether the actors are "authorities" or not and by merely proving that their actions had a public and not a merely private impact. It must be some such consideration which led Mathew, J. not only to agree with the majority judgment in *Sukhdev Singh v. Bhagatram* (Supra) but also to join in the unanimous judgment in *Sabhajit Tewary v. Union of India*, (Supra).

(33) Learned counsel for the petitioners then contended that the I.C.A.R. is an emanation of the Government and should, Therefore, be regarded either as Government or as authority.

(34) What is an "authority" either for the purposes of Article 226 or of Article 127? A three-fold classification may be made of bodies or persons contending to be eligible to be regarded as "authorities". On the one hand are statutory authorities. They are created by a statute and derive their power from the

statute. They satisfy the usual condition precedent to be considered as "authorities" within the meaning of Articles 226 and 12. On the other hand are registered societies and companies. These are voluntary creations of associations of private persons. Their power is derived from themselves. The statutes under which they are registered or incorporated only help them to attain a legal personality. An association before it becomes a legal person is only a metaphor. For instance, we speak of a jury, a bench of judges, a public meeting or even of the community itself as being a person instead of being merely a group of persons. We personify a group of individuals thereby. But legal personality is not reached until the law recognises over and above the associated individuals a legal person which represents them but is not identical with them. The object of the Societies Registration Act and the Companies Act is not to create societies and companies but only to confer legal personality on existing societies and existing companies. As the companies and the societies are not created by statutes, the powers exercised by them are not the result of a statutory creation but only a result of voluntary association and functioning under statutory regulation. The societies and companies are not, Therefore, "authorities". In between there two clauses is an indeterminate institution which was held to be an "authority" within the meaning of Article 226 by a Division Bench of this Court in *Amir-Jamia and Others Vs. Desharath Raj*, . On the one hand, the Jamia Millia was a registered society. In that sense, Therefore, it was not an "authority". On the other hand, a notification was issued u/s 3 of the University Grants Commission Act declaring it to be a deemed University for the purposes of the University Grants Commission Act. The creation of the Jamia Millia as an University was, Therefore, the result of the notification of the Government in exercise of a power conferred on the Government by a statute. The result of the notification was that the Jamia Millia got the power to confer degrees on students. It, Therefore, became a body which had the legal authority of determining questions affecting the rights of subjects and which purported to exercise disciplinary powers over its students and prevented the respondent from appearing at an examination. This power was derived from the statutory authority of conferring degrees. In these circumstances, Jamia Millia was held to be an authority under Article 226 of the Constitution. Jamia Millia was, however, deemed to be a University only for the purposes of the University Grants Commission Act. It is only because the withholding of permission to a student to appear at an examination and thus obtain a degree was a function which could be related to the statutory power of conferring degrees that for the purposes of the case before the Division Bench Jamia Millia could be held to be an authority under Article 226. In view of the decisions of the Supreme Court in *Sukhdev Singh v. Bhagatram* and *Sabhajit Tewary v. Union of India*, referred to above, however, the I.C.A.R. in the present case cannot be regarded as an "authority" in the matter of appointing its staff even for the purposes of Article 226.

(35) It was then argued for the petitioners that the power of the Government was conferred on the I.C.A.R. by the executive action of the Government and,

Therefore, the I.C.A.R. should be regarded as Government or an authority under Article 12 of the Constitution. This argument requires an examination of the concept of "executive action" of the Government. It is well known that the executive function is a residuary function. What is not legislative or judicial may be regarded as executive. *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, , the view of Mootham and Wanchoo, JJ. in *Moti Lal and Others Vs. The Government of the State of Uttar Pradesh and Others*, , was quoted with approval to the effect that "an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public". At page 236 it was observed that:-

"THE executive function comprises both the determination of the policy as well as carrying it into execution.....or supervision of the general administration of the State".

Since the Government or the State under the Constitution can sue and is capable of being sued (Article 300), can carry on trade or business (Article 298) and can enter into contracts (Article 299) it is a kind of legal person. The executive power of such a legal person is to regulate its own affairs so long as this does not affect the rights of a third person. The executive power of the Government, Therefore, enables it to act like a person carrying on business or trade, entering into contracts and carrying on its own administration and policy within the Constitution and without contravening the Constitution or any law. An executive resolution of the Government can re-organise its departments. But an executive resolution cannot create a legal entity with legal powers and yet enable it to remain outside the Government. That can be done only by a statute. For instance. the Government by an executive resolution could create the Rajasthan Canal Authority or the Board of Scientific and Industrial Research and the Industrial Research Utilisation Committee because they were all parts of the Government. Similarly, by prerogative action the Crown in Great Britain could create the Criminal Injuries Compensation Board without resort to statute because the said Board was a part of the Government. This was recognised by Lord Parker, C.J" in *R. v. Criminal Injuries Compensation Board*, (1967) 2 G. B. 864(16) in the following words :-

"IT is, as Mr. Bridge said, "a servant of the Crown charged by the Crown, by executive instruction, with the duty of distributing the boundary of the Crown". It is clearly, Therefore, performing public duties."

But one cannot conceive the executive power of the Government to extend to the creation of new legal persons which would stand and act on their own (out side the Government) without being part of the Government. Such legal personality ca,n be conferred only by law. As was observed by Solmond "a legal person is any subject-matter to which the law attributes a merely legal or fictitious personality. This extension for good and sufficient reason of the concept of

personality beyond the limits of facts-this recognition of persons who are not men-is one of the most noteworthy events of legal imagination". ("Jurisprudence", 9th Edition, page 425). The State exercising only executive power cannot create a legal person beyond the limits of fact. That can be done only by law which means by statute in India. An authority within the meaning of Article 12 cannot, Therefore, be created by the executive action of the Government it such authority is to exist outside and independently of the Government.

(36) Our answer to the second question, Therefore, is that there is no legal duty or obligation on the I.C.A.R. which is sought to be enforced by the present writ petitions.

(37) Questions 3 And 4 :- As a result of the answers to the first two questions, the writ petitions become not maintainable and are liable to be dismissed. For the sake of a complete decision of all the points which were argued, however, we may give our decision on the third and the fourth questions also, though only briefly.

(38) In the employer and employee relationship not regulated by statute or statutory rules the question of bona fides cannot arise. If the employer is inimically disposed towards the employee and acts in a biased manner against the employee, the employee has got no legal right nor is the employer under any legal obligation as can be the subject-matter of a writ petition which gives only public law remedies while the master and servant relationship is private and contractual in the eyes of law.

(39) The allegations of bias made by Dr. Gupta may now be considered. He is alleging bad relations with Dr. Swammathan and Dr. Naik. But he did not fare well even with their predecessors. He got a bad confidential report in 1969 from the then Head of his Department Dr. Das and his appeal against it was rejected by the then appellate authority Dr. B. P. Pal, the then Director-General of the I.C.A.R. It appears that he did not get students to work under him. In making this allegation he is on the defensive. He says that an impartial committee should be appointed to inquire whether the students are unwilling to work under him. It would be a disputed question of fact as to what students would have worked under him and why they did not work under him. He also alleged that staff and materials for conducting research were not supplied to him. There is a letter by Dr. Naik to Dr. Gupta taking note of the complaints and assuring him that the grievances would be redressed. It would show that Dr. Naik was not biased against him.

(40) The post of Senior Biochemist was first advertised in 1970. Dr. Gupta, Dr. Raman and Dr. Mehta were all interviewed by a Selection Committee appointed by the Director-General on May 20, 1971. Dr. Gupta was irresponsible enough to allege in the writ petition that he was the only candidate recommended by the first Selection Committee and all others including Dr. Mehta were rejected by the

Committee. The facts disclosed by the record show that the first Selection Committee were of the view that none of the candidates interviewed by them fulfilled all the essential qualifications required to be possessed. They. Therefore, recommended that the essential qualifications should be amplified and the qualification requiring the "ten years" research experience in the field of nutrition" should be matched by an alternative qualification of "ten years" research experience in the field of protein chemistry". In one breath it is said by the petitioners that the alternative qualification was added to favor Dr. Mehta. In the same breath it is said that Dr. Mehta did not possess even the alternative qualification. It is also suggested that the second Selection was intended to favor Dr. Mehta. We are of the view that all these insinuations are unfounded. The first Selection Committee consisted of experts. The Court is not competent to find fault with their recommendation that "ten years" research experience in the field of protein chemistry" should also be an alternative qualification for the post.

(41) It was then said that Dr. Naik was nominated in the second Selection Committee by Dr. Swaminathan because Dr. Naik was not on good terms with Dr. Gupta. We have already stated above that there is no material to show that Dr. Naik or Dr. Swaminathan were biased against Dr. Gupta. It may be that Dr. Gupta was making complaints against them and others. But that could not show that the persons against whom he complained bore any grudge against him. The procedure for the formation of Selection Committee for the post of Senior Biochemist is set out in Bye-law 41 of the Bye-laws of the I.C.A.R. The panel of the Selection Committee had to include the Deputy Director-General in the I.C.A.R. concerned with the post. As no Deputy Director-General of the I.C.A.R. was concerned with this post he was not a member of the Selection Committee and rightly so. Dr. Gupta, is not justified in reading any ulterior motive in his absence from the Selection Committee. In the case of a national institute, the Selection Committee had to include the Director of the Institute or his nominee. At that time Dr. Swaminathan had". become the Director-General but was also holding the post of the Director of I.A.R.I. pending the appointment of such a Director. Since he was forming a Selection Committee in his capacity as the Director-General of the I.C.A.R. he properly thought that he should not sit in the Selection Committee as the Director of the I.A.R.I. He had the authority to make a nomination and he nominated Dr. Naik for the excellent reason that Dr. Naik was the Head of the Division and the Senior Biochemist was going to work under him. Dr. Naik was, Therefore, the best person to select the Senior Biochemist. It was argued that the provision for nomination existed in Bye-law 41(l)(iii)(a) which related to a national institute but did not exist in Bye-law 41(l)(iii)(b) which related to other institutions and that the I.A.R.I. was not a national institute and, Therefore, the Director of the Institute himself should have been a member of the selection Committee and could not have sent a nominee on the Committee instead of himself. The expression "national institute" was used when the bye-laws were perhaps made in 1967 and were amended up to 1972, apparently to make it broader than the expression "institutes of national

importance" already used in Entry 64 of the Union List of the Seventh Schedule of the Constitution. "National Institutes" thus included not only "institutes of national importance" but also important all-India institutes which were in fact national but were not declared so by legislation. I.A.R.I. has been a national institute in the sense that it is of an all-India character and importance. It could, Therefore, be regarded as a national institute bona fide by Dr. Swaminathan and Dr. Naik could be nominated on the Selection Committee. It was then said that the Secretary of the I.C.A.R. did not himself attend the Selection Committee but sent his nominee. It has been explained that the Secretary of the I.C.A.R. is only an administrative officer and his participation in the Selection Committee is only to provide for the administrative requirements of the post. He does not act as a scientist in the Committee. It is absolutely immaterial whether he himself sat in the Committee or sent his nominee. We are of the view, Therefore, that neither any bona fides against Dr. Swaminathan or Dr. Naik nor the following of any wrong procedure proved by the petitioners. If there was any non-compliance with any procedure it was purely non-compliance of the administrative instructions and did not vitiate the selection by the second Selection Committee.

(42) Dr. Naik has made an affidavit that the research experience in molecular biology is not exclusive of the research experience in the field of protein chemistry. This would show that two are allied with each other and experience in one discipline may be regarded as equivalent to the experience in the other discipline. This is an expert opinion of Dr. Naik which has not been controverted by any other expert opinion. Dr. Mehta had the research experience in molecular biology. A Selection Committee of experts have selected Dr. Mehta for the post with full knowledge of what kind of qualifications and experience were necessary for the post. In terms of the second advertisement which was issued in 1971 the Selection Committee which interviewed the candidates had the power to relax any of the qualifications required by the advertisement to be possessed by a candidate. The research experience of Dr. Mehta started from October 1962 when he was preparing research thesis for M.Sc. The selection took place in February 1972. The research experience of Dr. Mehta, Therefore, fall short of the period of ten years. The Selection Committee however selected Dr. Mehta and thereby impliedly relaxed the necessity of ten years' experience in favor of Dr. Mehta. It was contended for the petitioners that the Selection Committee did not expressly say that they had made this relaxation. But the very fact that they selected Dr. Mehta by necessary implication meant that they had relaxed this qualification in favor of Dr. Mehta. Further, just as the bye-laws are not statutory, the terms of the advertisement were also not statutory. The selection is not vitiated by a non-compliance with either or both of them.

(43) Dr. Raman is even less successful in showing any bona fides on the part of Dr. Swaminathan. Certain dissatisfied scientists in the I.A.R.I. issued a two-page bulletin casting aspersions on the research made by Dr. Swaminathan. It was natural for Dr. Swaminathan to deprecate such conduct on the part of his colleagues and to prevent its recurrence in future. He, Therefore, issued a

circular requesting all persons whose names appeared in the bulletin and others to come for a meeting for a discussion of the matter. Dr. Raman was one of these whose names appeared in the bulletin. These persons refused to attend the meeting. It is alleged on behalf of Dr. Raman that Dr. Swaminathan must have thought that Dr. Raman was the author of the writing in the bulletin and, Therefore, he was biased against Dr. Raman. On the contrary, the persons whose names appeared on the bulletin stated that whatever was written there was a contribution by all these persons. It could not, Therefore, be attributed to Dr. Raman alone. Moreover, Dr. Swaminathan has done nothing at all against Dr. Raman. It is Dr. Raman's negligence that alone has caused his non-appearance at the interview by the second Selection Committee.

(44) Dr. Raman applied for the post of Senior Biochemist and gave an address before he was interviewed by the first Selection Committee. Thereafter he seems to have changed his address. In the acknowledgement form in which the applications from the candidates were acknowledged by the I.C.A.R. it was expressly stated that the candidates should inform the I.C.A.R. any change in their address. Inspire of that Dr. Raman did not inform the I.C.A.R. the change in his address. The first Selection Committee had recommended that Dr. Gupta, Dr. Raman and Dr. Mehta who had appeared before them should be called for interview by the second Selection Committee. An Under Secretary of the I.C.A.R. sitting in the Krishi Bhavan far away from the I.A.R.I. wrote a letter to Dr. Raman at the address given in the application calling him for the interview before the second Selection Committee. That letter was returned with the remark that the addressee has left without giving a new address to the post office. Dr. Raman admits that he read the new advertisement for the post before the candidates were interviewed by the second Selection Committee. Nevertheless, he neither applied for the post nor went for interview before the second Selection Committee. He explains this by saying that he thought that the new advertisement was for some new post. This statement is unbelievable. The new advertisement was obviously for the same post. Dr. Raman, was working in the Biochemistry department of the I.A.R.I. along with Dr. Gupta. Dr. Gupta understood the new advertisement all right and appeared before the second Selection Committee. It is unbelievable that Dr. Raman would not have talked to Dr. Gupta and others about the new advertisement and could have over thought that it was for a new post. Even if he thought so he did not give any reason why he did not apply for it or appear for interview. Either Dr. Raman was not hopeful of getting the job or he had some other reasons for not applying. He was not, Therefore, considered by the second Selection Committee. Dr. Raman has to thank himself for this predicament.

(45) On the third and the fourth questions, Therefore, we are of the view that there is neither a full pleading nor proof of facts Constituting bona fides against Dr. Swaminathan and Dr. Naik. It was not, Therefore, necessary to file affidavits for them in Dr. Gupta's petition, though they filed such affidavits in Dr. Raman's petition. Further, there is absolutely no material to show that either Dr.

Swaminathan or Dr. Naik were prejudiced against the petitioners. Lastly, the procedure in making the appointment according to the bye-laws and the advertisement was followed as far as possible by the second Selection Committee. The selection of Dr. Mehta was, Therefore, not vitiated either by bona fides or by non-compliance With the procedure.

(46) Dr. Gupta has also complained of his removal from the Faculty of the Post Graduate School by its Academic Council, J.A.R.I. (Respondent 7). From the record, the reason for his removal appears to be two-fold. Firstly, Dr. Gupta himself had written letters staling his dissatisfaction about certain things and staling that it was not possible for him to continue as a member of the Faculty. This was clearly an expression of the desire to resign from the Faculty. The Academic Council, Therefore, rightly acted on it and relieved Dr. Gupta from the membership of the Faculty. Secondly, Dr. Gupta wrote a provocative letter couched in irresponsible language alleging that the Head of the Department had fabricated facts in reporting some previous proceedings of the Board of Studies. The members of the Academic Council were justified in thinking that a person who can make such irresponsible allegations would not contribute to the harmonious working of the Academic Council. They, Therefore, unanimously resolved that Dr. Gupta should not be a member of the-Faculty of the Post Graduate School. However, Dr. Gupta has not stated who nominated him to the Faculty and who had the power to remove him from it. He had not stated what is his legal right to remain in the Faculty and what is illegal about his removal from the sa,id Faculty. He said that the Academic Council should have heard him before removing him from the said Faculty of the Post Graduate School. It is only when civil consequences flow from an action adverse to the rights of an individual that the individual has to be heard before action is taken. In the circumstances stated above, the cessation of Dr. Gupta from the membership of the Faculty of the Post Graduate School by the Academic Council could not visit him with any civil consequences. There was, Therefore, no need for hearing him before he was removed from the membership. Lastly, a writ petition cannot lie against the Academic Council or the I.A.R.I./I.C.A.R. for the findings given above on Questions I and 2. Even if there is an illegality in the removal of Dr. Gupta from the Faculty of the Post Graduate School by its Academic Council, it cannot be remedied by a writ petition. Unlike the I.C.A.R. the Academic Council of Post Graduate School is not a legal person. It cannot be sued as such. All of its members are not parties to the writ petition. No relief can, Therefore, be given against the so-called Respondent 7.

(47) For the above reasons both the writ petitions are dismissed but in the circumstances without any order as to costs.