

**ARTICLE 12 OF THE CONSTITUTION AND THE NEW HORIZONS OF
FUNDAMENTAL RIGHTS****DR. JOGIRAM SHARMA*, AVNISH KUMAR SHARMA****

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Fundamental rights can be enforced against the 'State' as widely conceived in Article 12 of the Constitution. Fundamental rights guaranteed under Articles 15(2), 17 and 23 can be enforced both against the 'State' as well as private individuals. Article 12 defines 'State' to specify the authorities and agencies which shall act in conformity with the provisions of part III of the Constitution. Article 12 runs as follows: "In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India".

Thus 'State' as widely defined in Article 12 would include: (1) the Union Legislature and the Executive; (2) the State Legislature and the Executive; (3) Local authorities,¹ such as Panchayats, Municipalities, Corporations etc., and (4) Other authorities. In this paper an attempt has been made to analyse the recent judicial pronouncements which made the instrumentalities of the Government, irrespective of the nature of their creation, accountable to Part III of the Constitution and thereby enlarged the constituency of the fundamental rights. Though the judiciary is not expressly included within the definition of the word 'State', it is clear from the decision of the Supreme Court in *Sridhar Mirajkar*,² that the judiciary also comes within the definition of the State.

'Other authorities' and Judicial Interpretation

Art. 12 uses the expression 'other authorities'. This raises the question as to which authority can be regarded as coming within the sweep of the expression 'other authorities' as used in Art. 12. It is to be noted that the scope of fundamental rights mainly depends upon the judicial interpretation of Art. 12. If the courts can give a liberal and wider connotation to Art. 12, then such an interpretation will extend the nature and scope of part III of the constitution. If Art. 12

is subjected to a narrow construction, then this virtually amounts to curtailing and imprisoning the efficacy of the rights guaranteed under part III of the Constitution. The Supreme Court explained the meaning of the expression 'other authorities' in Electricity Board Case.⁴ In the instant case attention was concentrated on the definition of 'State' in Art. 12 and the test for what is 'an authority' was laid down. In Electricity Board Case, the question was whether the Electricity Board of Rajasthan which was constituted under the Electricity (Supply) Act, 1948 was a 'State' within the meaning of Art. 12.

Answering the question affirmatively, Bhargava, J., observed: "The expression 'other authorities' in Art. 12 will include all constitutional or statutory authorities on whom powers are conferred by Law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Art. 19(1) (g). In part IV, the State has been given the same meaning as in Art. 12 and one of the Directive Principles laid down in Art. 46 is that the state shall promote with special care the educational and economic interests of the weaker sections of the people. The 'State' as defined in Art. 12 is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The state, constituted by our constitution, is further specifically empowered under article 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word 'State' used in Art. 12. On the other hand, there are provisions in the Electricity Supply Act which clearly show that the powers conferred on the Board include power to give directions, the disobedience of which is punishable as a criminal offence"⁵ The test laid down by Bhargava, J., was that a constitutional or statutory authority empowered to issue binding directions to third parties and to enforce them on pain of penalty was other authority' and so 'State' in Art. 12.

Shah, J., In Electricity Board Case opined: "Those authorities which are invested with sovereign power i.e., the power to make rules or regulations and to administer or enforce them to the detriment of citizens and others fall within the definition of 'State' in Art. 12, and constitutional or statutory bodies which do not share that sovereign power of the State are not, in my judgement, "State" within the meaning of Art. 12 of the Constitution"⁶ The court in the

instant case held that Electricity Board is an 'authority' coming within the expression of 'other authorities' used in Art. 12 and hence it is subject to the provision of part III of the constitution. The observations of the court in the instant case referring to Art. 46 also in effect disapproved Shanta Bais⁷ ruling wherein the Madras High Court held that University is not a 'State'. Relying upon the Electricity Board case the Patna High Court observed in Umesh v. V. N. Singh⁸ that University is a 'State' within the meaning of Art. 12 of the Constitution and is subject to part III of the Constitution.

This takes us to Sukh Dev Singh⁹ wherein the question raised for the judicial determination was whether ONGC, LIC and IFC can be regarded as "other authorities" within the meaning of Art. 12 of the Constitution, for the purpose of enforcing fundamental rights. The Supreme Court held that the expression "other authorities" in Art. 12 is wide enough to include within it every authority created by a statute and functioning within the territory of India or under the control of the Government of India. These statutory bodies are "authorities" within the meaning of Art. 12. The court held that ONGC, LIC and IFC come within the scope of the expression 'other authorities' and the employees of these statutory corporations can invoke fundamental rights against them. The court further lamented : "The employees these statutory bodies have a statutory status and they are entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions. The employees of these statutory corporations are entitled to claim protection of Articles 14 and 16. However, these employees are not servants of the Union or the State"¹⁰ In the instant case Mathew, J., advocated a broader and wider test to determine whether a body would be an authority within the meaning of Art. 12. The learned judge observed that if a statutory corporation was an agency or instrumentality of the Government, it was "other authority" and so "State". In Sukhdev Singh, the Court also explained the distinction between a corporation created by a statute and one created under a statute.

The Court observed that a company incorporated under the Companies Act is not created by the Companies Act, but comes into existence in accordance with the provisions of the Act. Therefore, an incorporated company is not a statutory body and hence it is not subject to part III of the Constitution. However, Alagiriswamy, J., in his dissent disapproved the distinction and maintained that even a corporation created by a statute is not subject to part III. The learned judge took the stand that the fact that a Corporation or a company is created by a statute or under a statute does not make any difference. Therefore, ONGC, LIC and IFC are not

authorities within the meaning of Art. 12 and regulations framed by them have no statutory status and the employees of these corporations are not entitled to declaration of being in employment when their dismissal or removal is in contravention of statutory provisions.¹¹ It is submitted that the opinion expressed by the learned judge is untenable and unconvincing since it virtually makes the expression 'other authorities' in Art. 12 as a dead letter. The broader test laid down by Mathew, J., in *Sukhdev Singh*, to determine whether a body would be an agency of the State or not has received appreciation and recognition in *International Airports Authority*¹²

A high watermark has been reached in the definition of the State by the decision of the Supreme Court in this case. The decision of the court in the instant case made great strides in the interpretation of the expression "other authorities" used in Art. 12. In fact, the decision of the court opened new vistas and horizons of fundamental rights. It also unfolded the nature and scope of fundamental rights by laying the tests which make the non-statutory bodies also account led to the provisions of part III of the Constitution.

Krishna Iyer J called out the following Factors from *Airports Authority* case, as rendering a statutory corporation a government company, a Co-operative Society and other registered society of body into a State and they are not confined to statutory Corporations alone. They are:¹³ (1) "if the entire share capital of the Corporation is held by the Government, it would go a long way towards indicating that the Corporation is an instrumentality or agency of Government"; (2) existence of "deep and pervasive state control may afford an indication that the corporation is a State agency or instrumentality"; (3) it may also be a relevant factor... whether the Corporation enjoys monopoly status which is State conferred or State-protected"; (4) "if the functions of the corporation are of public importance and closely related to Governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government"; and (5) "specifically, if a department of Government is transferred to a Corporation, it would be a strong factor supportive of this inference" of the Corporation being an instrumentality or agency of Government." By applying the above tests Bhagwati, J., held that the *Airports Authority* was State and it was bound by Art. 14. *U.P. Warehousing Corporation* case¹⁴ is another instance where Chinnappa Reddy, J., had no hesitation to hold that the *Warehousing Corporation*

The Supreme Court in *Somprakash Rekhi*¹⁵ expanded the frontiers of the fundamental rights to protect the individuals against arbitrary actions. In the instant case the issue was whether *Bharat Petroleum Corporation*, a Government company incorporated under the Companies Act, was

"State" within the meaning of Art. 12 of the Constitution. Somprakash Rekhi is different from Airports Authority case because in the latter case Airports Authority is created by a statute and in the former case Bharat Petroleum Corporation came into existence under a statute. for the first time in the judicial history of India in Somprakash Rekin, Air activist Supreme Court following the dictum of Bhagwati, a Airporis Authority held that Bharat Petroleum Corporation, a registered Government Company falls within the expression 'other authorities as used in article 12 hence State is amenable to part III of the constitution.

Krishna Iyer, J., in Somprakash Rekhi reiterated the preponderant consideration for pronouncing an entity as a State agency or instrumentality. They are ¹⁶

(1) financial resources of the State being the chief funding source; (2) functional character being Governmental in essence; (3) plenary control residing in Government prior history of the same activity having been carried on by Government and made over to the new body; and (5) some element of authority or command.

The Andhra Pradesh High Court in Satyanarayana v. State,¹⁷ following the principles culled out by Krishna Iyer, J., from Airports Authority case, ruled that A. P. Irrigation Development Corporation and A. P. Leather Industries Development Corporation incorporated under the Companies Act. 1956, can be termed as the agencies of the State and are amenable to part III of the Constitution. In the course of its judgement the court added the following principles by way of clarification¹⁸ in applying the above tests¹⁹ it is not very much relevant whether the corporation is created by a statute or is incorporated under a statute; e.g., Companies Act, Societies Registration Act etc; it is not necessary that all the tests pointed out above should be satisfied. It would be a question to be determined in a given situation on an aggregate of the relevant circumstances. If a corporation is vested by law with power to give directions, the disobedience of which is punishable as a criminal offence or is invested with the power to make Rules and Regulations and to administer or enforce them to the detriment of the citizens and others, it would by themselves be "authority within the meaning of Art. 12; and a writ, order or direction can be issued under Art. 226 to such corporations both for fundamental rights and also for enforcement of a statutory right.

Sabhajli Tewary v Union of India²⁰ is the best example, which maintained the distinction between a body created by a statute and under a statute.

The CSIR receives financial assistance from the union Government and is also subject to some measure of control by the Government. Hence, CSIR is really an agency of the Government and is subject to the provisions of part III. A Constitution Bench consisting of five judges speaking through A. N. Ray, C. J., unanimously expressed the view that CSIR, a society registered under the Society Registration Act is not an authority within the meaning of Art. 12 of the Constitution and hence it is not accountable to part III of the Constitution. It is submitted that the court was reluctant to follow Mathew's, J., instrumentality test in Sukhdev Singh's case. However, the decision of the court in the instant case has lost its ground and much of its efficacy after the decision of the Supreme Court in International Airports Authority and Somprakash Rekhi.

Ajay Hasia²¹ disapproved Tewary's ruling and thereby extended the roots of part II even to touch societies registered under the Society Registration Acts. Today throughout the country there is a mushroom growth of educational institutions. To establish a college on the pretext of imparting general education has become a profitable business in the country. The question here is whether these educational institutions run by the societies registered under the Societies Registration Act are subject to the provisions of part III. Ajay Hasia is directly connected with the above question. The decision of the Supreme Court in Ajay Hasia is another milestone in expanding the definition of "State" in Art. 12. In the instant case the validity of admissions to Regional Engineering College, (R.E.C. in short) Srinagar, was challenged by invoking fundamental rights. The college raised a preliminary objection that the writ petition is not maintainable since fundamental rights cannot be enforced against a college created by a society registered under the Jammu & Kashmir Societies Registration Act. But the fact is that Thi R.E.C., Srinagar, was one of the fifteen Regional Engineering colleges sponsored by the Union Government.

The Court in Ajay Hasia took the view that the expression other authorities in Art. 12 must be given a broad and liberal interpretation, where constitutional fundamentals vital to the maintenance of human rights are at stake and functional realism and not facial cosmetic must be the diagnostic tool, for Constitutional Law must seek the substance and not the form. The court pointed out that the Government may act through the instrumentality or agency of juridical persons to carry out its functions, since, with the advent of the welfare State, its new tasks have increased manifold and such juridical persons acting as the instrumentality or agency of the Government must therefore be subject to the same discipline of fundamental rights as the State. Proceeding further in Ajay Hasia, the Court observed: "Now it is obvious that if the

corporation is an instrumentality or agency of Government, it must be subject to the same limitations in the field of constitutional law as the Government itself though in the eyes of law it would be a distinct and independent legal entity. If the Government acting through its officers is subject to certain constitutional limitations, it must follow a fortiori that the Government acting through the instrumentality or agency of a corporation should equally be subject to the same limitations. If such a corporation were to be free from the basic obligation to obey the fundamental rights, it would lead to considerable erosion of the efficiency of the fundamental rights, for in that event the Government would be enabled to override the fundamental rights by adopting the stratagem of carrying out its functions through the instrumentality while retaining control over it ²²

Ajay Hasia influenced the High Courts to make educational institutions answerable to part III of the Constitution. P.A. Choudhary, J., following Ajay Hasia held in Prasad v. Sanghi College, ²³ "Every educational institution in our State receiving substantial State aid is an duority within the meaning of Art. 12 of the Constitution²⁴ and is bound by and accountable to part III of the Constitution". 3a Ajay Hasia was further strengthened by the decision of the Supreme Court in Minhas,²⁵ where the issue was whether fundamental rights guaranteed under Articles 14 and 16 can be invoked against Indian Statistical Institute, a society registered under the Societies Registration Act. The Court following Ajay Hasia held that the Institute is an authority within the meaning of Art. 12 since it is receiving financial assistance from the Union Government and is being subjected to its control. Similarly in Rama Chandra Iyer,²⁶ the Court has no hesitation to hold that Indian Council of Agricultural Research (ICAR) and its affiliate Indian Veterinary Research Institute (IVRI) fall within the expression 'other authorities' in Art. 12 of the Constitution.

Conclusion

The recent judicial pronouncements beginning with Airports Authority have enlarged the constituency of fundamental rights. Bhargawa's, J., test in Electricity Board Case that 'other authorities means only statutory or constitutional authorities on whom powers are conferred by law has lost its relevance since it is narrow and lexicographic test which imprisoned the Fundamental Rights within statutory and constitutional confines. Mathew's, J., instrumentality or agency test in Sukhdev Singh has Airports Authority, and the learned judge further amplified the test with multifacets to expand the roots of part III of the Constitution and to cut across the statutory and Constitutional chains to enable the stream of Part III to flow freely to all corners. The decisions of the courts in subsequent cases following

Bhagwati, J., dictum, enlarged the constituency of part III by giving a liberal interpretation to the expression 'other authorities' in Art. 12 of the Constitution. The new but welcoming trend is continuing to its logical end. The result is that an incorporated corporation and a registered society are also subject to part III of the Constitution. There is no reason why the expression 'other authorities' in Art. 12 should be confined only to statutory or constitutional bodies. Political parties, for example, even though they are not statutory organisations, and are in form private clubs, are to be within this category. So also are labour unions on which statutes confer the right of collective bargaining²⁷ It is hoped that in the years to come the courts will go a step forward and interpret the expression 'other authorities' in Art. 12 in such a way that it will include within its fold bodies private in character but dealing with public rights to make them accountable to part III of the Constitution as is being done in the United States of America. The courts can fully utilise the new trend set by Airports Authority to expand the constituency of fundamental rights to a greater extent so as to prohibit arbitrariness and discrimination and to extend the blessings of liberty and equality proclaimed in the preamble to the constitution .

References

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10. Ibid. p. 1348.
11. Ibid. p. 1378.
12. Ramana Dayaram Shetty v. the International Airports Authority. AIR 1979 SC 1628.
13. Somprakash Rekhi v. Union of India AIR 1981 SC 212 at p. 225.
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15. Supra, note 14.
16. Supra, note 14 at p. 229.
17. AIR 1981 A.P. 125.
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25. Minhas v. Indian Statistical Institute. AIR 1984 SC 363.
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