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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2833 OF 2012
WITH
NOTICE OF MOTION NO. 99 OF 2014

All India IDBI Officers Association .. Petitioner
Vs.
Union of India and ors. .. Respondents

Mr. Vinay Kumar Garg, Senior Advocate a/w Mr. Ankur Chibber, Mr. Hitesh C. Soni, Ms. Vaishali Soni and Mr. Parv Garg, Advocates i/b M/s. Hitesh Soni and Associates, for Petitioner.

Ms. Shehnaz V. Bharucha and Mr. Mohamedali M. Chunawala, Advocates i/b A.A.Ansari, for Respondents No. 1 and 3.

Mr. Sudhir K. Talsania, Senior Advocate a/w Mr. Vishal Talsania, Advocate i/b Ms. Kanchan Pamnani, for Respondent No. 2.

WITH

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 214 OF 2016

I.D.B.I. Officers Organization and anr. .. Petitioners
Vs.
The IDBI Bank Ltd. and anr. .. Respondents

WITH

WRIT PETITION NO. 12607 OF 2015

Shri A. V. Koparkar and ors. .. Petitioners
Vs.
The I.D.B.I. Bank Ltd. and ors. .. Respondents

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Mr. A. S. Rao, Advocate for Petitioners.
Mr. Sudhir Talsania, Senior Advocate i/b Mr. Sanjay D. Kelkar and Mr. Omkar S. Kelkar, for Respondents No. 1 to 3 in WP/12607/2015.
Ms. Shehnaz V. Bharucha, Advocate for Respondent No. 2 in WP/214/2016.

CORAM : DIPANKAR DATTA, CJ. &
M. S. KARNIK, J.

RESERVED ON : AUGUST 11, 2022
PRONOUNCED ON : SEPTEMBER 20, 2022

JUDGMENT [Per the Chief Justice]:

INTRODUCTORY NARRATIVE

1. These 3 (three) writ petitions are at the instance of the All India IDBI Officers Association (hereafter "Association", for short), the I.D.B.I. Officers Organization (hereafter "Organization", for short) and 4 (four) former employees (hereafter "petitioning employees", for brevity) of the Industrial Development Bank of India Ltd. (hereafter "IDBI Ltd", for short). The common and the principal contesting respondent in all these writ petitions is IDBI Ltd.

2. Arraying the Union of India, IDBI Ltd. and the Chairman of the Pension Fund Regulatory and Development Authority (hereafter "PFRDA", for short) as the 3 (three) respondents in that order, the Association in its writ petition dated 6th August 2012 has prayed that (a) the impugned circular dated 18th April 2012 (hereafter "impugned circular", for short) be quashed upon declaring the same to

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be illegal and unconstitutional; (b) the respondents be directed to withdraw, cancel and/or rescind the impugned circular; (c) the respondents be directed to extend one more opportunity to opt for pension under IDBI Defined Benefit Pension Scheme to the officers who did not/or could not exercise an option earlier to opt for such scheme; and (d) the resolutions under which the PFRDA is functioning be declared as *ultra vires* the Constitution and the same may, accordingly, be set aside and quashed.

3. The impugned circular, referred to in prayer clauses (a) and (b) of the writ petition, purportedly notified a New Pension Scheme (hereafter "NPS", for short). The said circular reads as follows:

> "IDBI Bank/2012-13/53/DCPS/HR-8 April 18, 2012
>
> Heads of Verticals, Departments,
> CGM, Zonal PBG Offices,
> Regional and Branch Heads,
> JNIBF Staff College,
> IDBI Bank Ltd.
>
> Dear Sir/Madam
>
> **IDBI Bank Ltd. New Pension Scheme (IBLNPS)**
>
> The Board of Directors of the Bank at its meeting held on March 20, 2008, approved the proposal envisaging that the new recruits joining the service of the Bank on or after April 01, 2008, excluding those who have been already been issued Offer Letters and who were in the process of joining, shall not be placed under the existing IDBI Pension Scheme and would be offered 'Defined Contribution Pension Scheme' (DCPS), also referred as New/National Pension Scheme (NPS),

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to be drawn up by the Bank in due course.

The Board of Directors in its meeting held on October 20, 2011 has approved the 'IDBI Bank Ltd New Pension Scheme (IBLNPS) Rules, 2011'. In light of the scope of the product offered by PFRDA, these Rules are further amended in the meeting of the Board of Directors held on March 28, 2012. The salient features of the Scheme, operational guidelines and the process flow have been provided in the **Annexure I, Annexure II, and Annexure III** respectively.

In the case of employees covered under IBLNPS, presently 10% of the pay Eligible for PF is being recovered and temporarily credited in their Provident Fund (Employees' contribution) account. The Bank has also provided for its contribution as per the scheme.

From April 2012, recovery from salary will be made as per the provisions of the IBLNPS [*i.e. 10% of (Basic pay + DA)*]. The arrears for the period from April 01, 2008 or the date of joining, whichever is later, in respect of 10% of DA will be recovered in 10 monthly installments commencing from April, 2012. The balance in Provident Fund Account, of the employees covered under IBLNPS, will be transferred to their Pension Account with PFRDA and the employee will thereafter cease to be a member of the Provident Fund.

All concerned are requested to go through the contents of the Annexure and take required steps immediately.

The contents of the circular may please be brought to the notice of all employees attached to your Office / Department.

Yours faithfully,

Encl : as above.

Sd/-
(T R Bajalia)
Executive Director
(Human Resources)"

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4. In the order dated 27th July 2022 passed by us, we have recorded that the Association did not wish to press Chamber Summons (L) No.291 of 2019 for amendment of the writ petition as well as prayer clauses (c) and (d) above. Consequently, the said chamber summons stood disposed of as not pressed and the grievance in the writ petition was confined to consideration of prayer clauses (a) and (b) above.

5. The writ petition of the Organization dated 20th June, 2014, wherein IDBI Ltd. and the Union of India are respondents, seeks (a) rule; (b) direction on IDBI Ltd. to give 2nd (second) option to all the Provident Fund optee officers and other employees, transferred from erstwhile United Western Bank Ltd. (hereafter "UW Bank", for short) as well as the officers of UW Bank who retired after 1st November 2013; (c) direction on the respondents to grant pensionary benefits to those of the transferred employees who give their 2nd (second) option in accordance with a joint note dated 27th April 2010 and letter of the Indian Banks Association dated 9th November 2012; and (d) permission to the erstwhile employees of UW Bank who had resigned after putting in 20 (twenty) years of service to opt for the Pension Scheme.

6. The petitioning employees have been superannuated from service on attainment of 58 (fifty-eight) years of age. Claiming that they were entitled to serve IDBI Ltd. till 60

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(sixty) years of age, the petitioning employees instituted the writ petition dated 9th May 2014. It was prayed therein that the decision of the respondents (IDBI Ltd. and its officers) to retire them at the age of 58 (fifty-eight) years be declared illegal and they be held entitled to wages for the balance period of 2 (two) years as well as enhanced superannuation and consequential benefits.

7. All these writ petitions are contested by IDBI Ltd. Preliminary objection to the maintainability of these writ petitions has been raised by contending that IDBI Ltd. is not a "State" within the meaning of Article 12 of the Constitution of India. In the alternative, it has been contended that even if IDBI Ltd. were a "State" on the dates these writ petitions were instituted, as noted above, IDBI Ltd. has ceased to be a "State" on and from the date Life Insurance Corporation of India (hereafter "LICI", for short) acquired 51% shares of IDBI Ltd. and became the major shareholder.

SUBMISSIONS ON BEHALF OF THE ASSOCIATION

8. Mr. Vinay Kumar Garg, learned senior counsel for the Association invited our attention to the Industrial Development Bank of India Act, 1964 (hereafter "IDBI Act", for short) and then to the Industrial Development Bank (Transfer of Undertaking and Repeal) Act, 2003 (hereafter "IDB Repeal Act", for short) for showing the transition of the Industrial Development Bank of India (hereafter

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"Development Bank", for short) from a body corporate to IDBI Ltd., a Government company within the meaning of section 617 of the Companies Act, 1956. He also drew our attention as to how post 2018, the shareholding pattern of IDBI Ltd. changed with the result that LICI, upon acquiring 51% of the shares, became the major shareholder. While contending that the Central Government retained administrative, functional and financial control over IDBI Ltd. till 2018, notwithstanding repeal of the IDBI Act, and that such control was deep and pervasive, Mr. Garg sought to demonstrate functional, administrative and financial control by urging as follows:

Functional Control of the Central Government

a. Article 161 of Articles of Association (hereafter "AoA", for short) dated 4th March, 2005 grants absolute power to the President of India to issue orders or directives to the Board of Directors for efficient management or conduct of business and affairs of the Company. It also incorporates doctrine of 'Public Interest' insofar as it confers a veto power upon the President of India to issue directives or annul any decision by the Board of Directors in public interest (*Pg. 49 of Convenience Compilation by Association).* Article 161 was omitted by amendment in the year 2019, pursuant to the acquisition of 51% shareholding by LICI.

b. Annual Report 2021-22 of IDBI Ltd. acknowledges that

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IDBI Ltd. is "*fully compliant with extant policy of the Government on reservation in services as applicable to the Public Sector Banks* (PSBs)[1].

c. Furthermore, advertisement no.02/2022-23 for recruitment of Specialist Cadre Officers-2022-23 in IDBI Ltd. includes relaxations for SCs, STs OBCs, Persons with Disabilities (hereafter "PwD", for short), Ex-servicemen and persons affected by the 1984 riots. The advertisement also provides that reservation for SC/ST/OBC/EWS shall be as per rules/guidelines of the Government for reservation, and to Ex-servicemen as per MHA Notification dated 27th October, 1986. It has also been clarified in clause 7.5 of the advertisement that "an ex-servicemen who has once joined in a Govt Job on the civil side after availing the benefits given to him her as an ex-servicemen for his/her re-employment, his/her ex-servicemen status *for the purpose of re-employment in Govt jobs* ceases[2].

d. Annual Report 2021-22 also acknowledges compliance with directives under the Right to Information Act, 2005 (hereafter "RTI Act", for short) and that IDBI Ltd. has appointed Central Public Information Officers (CPIOs) as per Section 5 of the RTI Act[3].

e. On the website of IDBI Ltd., it has been stated that in compliance with directive dated 15th November, 2010 issued

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1 Page 67 of Annual Report
2 Clause 2 Pg. 2, Clause 6.3 & 7 Pag. 24 of the advertisement
3 Page 72 of Annual Report

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by the Central Information Commission under section 19(8) of the RTI Act to all public authorities, IDBI Ltd. has also appointed a Transparency Officer[4].

f. Furthermore, IDBI Ltd. also acknowledges its compliance as a 'public authority' [defined in section 2(h)] with section 4(1) of the RTI Act[5].

g. Annual Report 2021-22 records acknowledgement of continuous efforts by IDBI Ltd. to implement various provisions of the Official Languages Act, 1963 and achieve targets issued by Official Language Department, Ministry of Home Affairs. Government of India[6].

h. Annual Report 2021-22 as also Advertisement No. 02/2022-23 show compliance by IDBI Ltd. with section 34 of the Rights of Persons with Disabilities Act, 2016 insofar as a separate reservation has been applied for PwD category in recruitment which is only applicable to Government Establishments[7].

i. Lok Sabha Secretariat OM dated 21st July, 2022 states that a Parliamentary Committee visited IDBI Ltd. to assess the extent of representation of SC/ST/OBCs in IDBI Ltd. This interference by the Lok Sabha Secretariat shows that there is a direct control of the Central Government in

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4 https://www.idbibank.in/transparency-officer.aspx as on 12th August, 2022
5 https://www.idbibank.in/section-4(1).aspx as on 12th August, 2022
6 Page 72 of Annual Report
7 Page 67 of Annual Report

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implementation of reservation policy in IDBI Ltd.[8].

Administrative Control of the Central Government

a. The scheme of the Companies Act, 1956, as was then applicable to IDBI Ltd., is such that in a company the Directors are appointed by way of election in the Annual General Meeting (AGM)[9].

b. However, Article 116 of the AoA prescribes that out of 13 directors and a Chairman, 8 directors are nominated by the Central Government directly and not elected by the shareholders, as opposed to the procedure prescribed under section 255[10].

c. Similarly. Article 118 of the AoA confers an unfettered power to the Central Government to terminate the term of the Chairman and the whole-time directors any time before expiry of their term[11].

d. Article 119 of the AoA provides that salary and allowances payable to the Chairman and the whole-time directors shall be determined by the Central Government.

e. Article 121 of the AoA provides that these nominated directors shall hold office at the pleasure of their appointing authority, i.e., the Central Government. These provisions of

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8 Lok *Sabha Secretariat OM dated 21st July, 2022*
9 *Section 255 of the Companies Act, 1956*
10 Pg. 46 of Convenience Compilation filed by Association
11 Pg. 47 of Convenience Compilation filed by Association

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the AoA evidence the fact that the Central Government exercises its deep and pervasive control over the Board of Directors of IDBI Ltd. not as a majority shareholder but as the Central Government exercising its sovereign power.

f. These provisions in the AoA were amended in the year 2019, after acquisition of shareholding by LICI, only to the extent that the role and powers of the Central Government were now conferred upon LICI, which is also the Central Government but only in disguise. Therefore, pursuant to the amendment in the year 2019, Articles 116, 118, 119 and 121 were amended to the extent that the directors are now nominated by LIC[12].

g. It was only in the year 2021 that the AoA were amended to give control to the shareholders and the Board of Directors in terms of the provisions of the Companies Act, 2013 and the direct control of Government through LICI in composition of Board of Directors was diluted[13].

h. The Ministry of Finance (hereafter "MoF", for short) invited applications for recruitment of Chief Vigilance Officer (CVO) in Public Sector Banks vide notification dated 30th July, 2021. This notification includes IDBI Ltd. in the category of Public Sector Banks[14].

i. The Cabinet Committee on Economic Affairs (CCEA), Government of India issued a Press Release dated 5th May,

[12] Pg. 71 & 72 of Convenience Compilation filed by Association
[13] Pg. 1-5 of Convenience Compilation filed by IDBI Ltd.
[14] Pg. 94 of Convenience Compilation filed by Association

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2021 stating that the Committee has given its approval for strategic disinvestment and transfer of management control in IDBI Ltd. Therefore, it has been admitted in this Press Release that at least prior to the disinvestment in the year 2019, the Central Government had management control in IDBI Ltd. It has been further admitted that the Central Government, directly and indirectly through LICI, owns more than 94% of equity in IDBI Ltd.[15].

j. The Department of Investment & Public Asset Management (hereafter "DIPAM", for short), MoF published a Request for Proposal for engagement of Transaction Advisor for facilitating DIPAM in the process of strategic disinvestment of IDBI Ltd. along with transfer of management control. till completion of the transaction, unless called off by the Government of India. This again acknowledges management control of IDBI Ltd. with Central Government and also evidences deep and pervasive control in administration of the Bank[16].

Financial Control of the Central Government

a. Between the years 2007 and 2014, the Central Government had been infusing equity in IDBI Ltd. by raising its shareholding from 52.67% to 76.50%[17].

b. Thereafter, Central Government infused more funds

[15] Pg. 80 of Convenience Compilation filed by Association
[16] Clause 3.2@ Pg. 81 & 83 of Convenience Compilation filed by Association
[17] Pg. 104 of Convenience Compilation filed by Association

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into IDBI Ltd. to increase its shareholding to 85.96% in the year 2018[18]. This infusion of funds by the Central Government, at least until the year 2018, shows that financial resources of the Central Government were the chief funding source for IDBI Ltd. (emphasis supplied by Mr. Garg).

c. Moreover, since 2019, the Central Government has indirectly increased its shareholding to more than 94% through LICI. Therefore, even today, financial resources of the Central Government directly and also indirectly routed through LICI remain to be the chief funding source for IDBI Ltd.[19].

d. Press Release dated 3rd September, 2019 shows that when IDBI Ltd. required infusion of capital, Rs. 9300 crores were infused by the Central Government (Rs. 4557 crores directly and Rs. 4743 crores through LIC)[20].

e. Even in the Budget Speech of the year 2021-22. the MoF announced infusion of Rs. 4557 crores in IDBI Ltd. along with other Public Sector Banks as a budgetary allocation[21].

f. This infusion of funds by the Central Government was necessitated by letter dated 5th May, 2017 issued by RBI wherein IDBI Ltd. was put under Prompt Corrective Action (PCA) and was suggested to bring more capital through

[18] Pg. 108 of Convenience Compilation filed by Association
[19] Pg. 114 of Convenience Compilation filed by Association
[20] Pg. 73 of Convenience Compilation filed by Association
[21] Pg. 79 of Convenience Compilation filed by Association

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Promoters/Owners[22]. However, the reasoning accorded by IDBI Ltd. to explain this constant infusion of funds by the Central Government to IDBI Ltd. is of no consequence since it is trite that while considering amenability of writ jurisdiction against a body, the only factor required to be considered is whether resources of the Government are the chief funding source of the body (again, emphasis supplied by Mr. Garg). Any reason for such funding by the Government is immaterial for this consideration.

9. Mr. Garg next proceeded to place materials to highlight that IDBI Ltd. is not a 'Private Bank' but a 'Public Sector Bank'. It was contended by him that:

a. Pursuant to the IDBI Repeal Act, RBI in its letter dated 15th April 2005 considered the shareholding pattern of IDBI Ltd. and accordingly, categorised it as "Other Public Sector Bank" considering it as a Government-owned Bank[23].

b. Similarly, MoF issued a notification dated 31st December 2007 wherein it was directed that IDBI Ltd. be treated at par with Nationalised Banks/State Bank of India for all purposes.[24]

c. **MoI** vide its letter dated 6th August, 2018 granted its NOC for reduction of shareholding by Central Government in IDBI Ltd. below 51% and for relinquishment of management control by Central Government in favour of

[22] Pg. 148 & S.No. (xi) @ Pg. 149 of Convenience Compilation filed by IDBI *Ltd.*
[23] Pg. 51 of Convenience Compilation filed by Association
[24] Pg. 52 of Convenience Compilation filed by Association

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LICI. Therefore, it is acknowledged that at least till 6th August 2018, the Central Government exercised management control in IDBI Ltd.[25].

d. Pursuant to acquisition of 51% shareholding by LICI in IDBI Ltd., RBI issued its Press Release dated 14th March, 2019 categorising IDBI Ltd. as "Private Sector Bank" only for regulatory purposes (emphasis supplied by Mr. Garg)[26].

e. In the Budget Speech for the year 2021-22, MoF acknowledged IDBI Bank as a Public Sector Bank and announced infusion of Rs. 4557 crores as budgetary allocation along with other Public Sector Banks, i.e., EXIM Bank and IIFCL[27].

f. Furthermore, vide its notification dated 30th July 2021, MoF recognized IDBI Ltd. as a Public Sector Bank along with other Public Sector Banks for the purpose of appointment of Chief Vigilance Officer[28].

g. Bombay Stock Exchange (BSE) categorises IDBI Ltd. as a Public Sector Bank with less than 48% public shareholding. It further shows that as on 30th June 2022 shareholding of the Government in IDBI Ltd. is 94.71% whereas public shareholding is only 5.29%[29]. Reference in this context was made to paragraph 14 of the decision of the Calcutta High Court in **Andrew Yule Head Office**

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[25] Pg. 54 of Convenience Compilation filed by Association
[26] Pg. 55 of Convenience Compilation filed by Association
[27] Pg. 79 of Convenience Compilation filed by Association
[28] Pg. 94 of 33. Convenience Compilation filed by Association
[29] http://www.bsepsu.com/gov-policy-hpl.asp as on 12.08.2022

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Retired Employees' Association vs. Union of India[30].

10. To buttress his contention that a department of the Government was transferred to a company, Mr. Garg invited our attention to the following facts:

a. Prior to enactment of the IDBI Repeal Act, IDBI Ltd. was only a Development Bank created for development of industries[31].

b. Section 3(2) of the IDBI Repeal Act provides that the Company now created, shall be deemed to be a banking company and shall carry out banking business in addition to the business which may be carried on and transacted by the Development Bank[32]. Accordingly, IDBI Ltd. carried on and transacted business of a Development Bank along with its business as a banking company. This function of a Development Bank to support industries is of public importance and is closely related to Governmental functions.

c. Subsequently, in Finance Act, 2021, section 3(2) of the IDBI Repeal Act was amended and the functions of the Development Bank to be performed by IDBI Ltd. were omitted[33]. This amendment by Finance Act**,** 2021 also evidences that until this amendment, IDBI Ltd. was also carrying out business of a Development Bank.

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30 2021 SCC OnLine Cal 2110
31 Pg. 1 of Convenience Compilation filed by Association
32 Pg. 32 of Convenience Compilation filed by Association
33 Pg. 170 of Convenience Compilation filed by IDBI Ltd.

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11. While placing judicial authorities for our consideration, Mr. Garg painstakingly took us through the text of the concurring opinion of Justice K.K. Mathew (as His Lordship then was) propounding tests for holding a body to be a "State" within the meaning of Article 12 in **Sukhdev Singh vs. Bhagatram Sardar Singh Raghuvanshi**[34] as well as the opinion of Justice P.N. Bhagwati (as the Chief Justice of India then was) presiding over the bench of 3 (three) learned Judges in **Ramana Dayaram Shetty vs. International Airport Authority of India**[35] elaborating and reformulating the tests propounded in the said concurring opinion in **Sukhdev Singh** (supra).

12. The Constitution Bench decision in **Ajay Hasia vs. Khalid Mujib Sehravardi**[36] was next placed and our attention was invited to the tests that the Court culled out from **Ramana Dayaram Shetty** (supra) for considering a body as "State" under Article 12 of the Constitution. The tests read:

> "(*1*) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p. 507, para 14)
> (*2*) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the

[34] (1975) 1 SCC 421.
[35] (1979) 3 SCC 489.
[36] (1981) 1 SCC 722.

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> corporation being impregnated with Governmental character. (SCC p. 508, para 15)
>
> (*3*) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State conferred or State protected. (SCC p. 508, para 15)
>
> (*4*) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)
>
> (*5*) 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. (SCC p. 509, para 16)
>
> (*6*) '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. (SCC p. 510, para 18)
>
> If on a consideration of these relevant factors it is found that the corporation is an instrumentality or agency of Government, it would, as pointed out in the *International Airport Authority case*, be an 'authority' and, therefore, 'State' within the meaning of the expression in Article 12."

13. Strong reliance was further placed by Mr. Garg on the decision in **Som Prakash Rekhi vs. Union of India**[37]. According to him, additional tests were laid down in paragraph 51 to the effect that the preponderant considerations for pronouncing an entity as State agency or instrumentality are (i) financial resources of the State being the chief finding source, (ii) functional character being Governmental in essence, (iii) plenary control residing in the Government, (iv) prior history of the same activity

[37] (1981) 1 SCC 449.

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having been carried on by the Government and made over to the new body and (v) some element of authority or command.

14. Moving on, Mr. Garg relied on the Constitution Bench decision in **Pradeep Kumar Biswas vs. Indian Institute of Chemical Biology**[38] where it has been observed that neither all the tests laid down in **Ajay Hasia** (supra) are required to be answered in the positive nor a positive answer to one or two tests would suffice. According to him, amenability to the writ jurisdiction will depend on a combination of these factors depending upon essentiality and the overwhelming nature of these factors in identifying the real source of power. The decision, it was submitted, clarified that while considering amenability to the writ jurisdiction, cumulative facts must be established to assess whether a body is financially, functionally and administratively dominated by or under the control of the Government. Referring to the materials in the compilations tendered across the bar to which we have adverted above, he urged us to hold that financially, functionally and administratively, IDBI Ltd. is entirely dominated by or under the complete control of the Central Government.

15. Mr. Garg also placed reliance on the decision in **Mysore Paper Mills Ltd. vs. Mysore Paper Mills Officers' Association**[39], which he contended was based on

[38] (2002) 5 SCC 111.
[39] (2002) 2 SCC 167.

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a factual matrix identical to the present case. Paragraph 4 was placed where the findings of the relevant High Court in the light of decisions of the Supreme Court were recorded. Paragraph 11 was next placed where the Supreme Court after observing that it had no doubt as to the identity of the appellant-Company being "other authority" and consequently "State" within the meaning of Article 12 of the Constitution, clarified that the definition of "State" has a specific purpose and that is Part III of the Constitution, and not for making it a Government or department of the Government itself. He finally placed paragraph 12 where the Court concluded, on the basis of the factors noted in paragraph 4, that more than 97% of the share capital of the appellant-Company has been contributed by the State Government and the financial institutions controlled and belonging to the Government of India.

16. Since, in the present case, more than 94% of shareholding is held by the Central Government and LICI (which is owned and controlled by the Government of India), Mr. Garg contended that IDBI Ltd. is an "other authority" and hence "State" as defined in Article 12 of the Constitution.

17. We next heard Mr. Garg address us that maintainability of a writ petition must be decided on the facts as they were on the date of its institution. According to him, law is settled that if a writ petition was maintainable on the date it is instituted but during pendency it ceases to be maintainable

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due to subsequent events, any objection in respect of maintainability must be decided with reference to the date of institution thereof. Reliance in this regard was placed on paragraph 9 of the decision of the Supreme Court in **Rajahmundry Electric Supply Corporation Ltd. vs. A. Nageshwara Rao**[40] and on paragraphs 27, 29 and 30 of a Division Bench decision of the Calcutta High Court in **Ashok Kumar Gupta vs. Union of India**[41].

18. The decisions in **Balmer Lawrie & Company Limited vs. Partha Sarathi Sen Roy**[42] and **T.N. Rugmani vs. C. Achutha Menon**[43] were also relied on by Mr. Garg. According to him, the said decisions are authority for the proposition that in a converse situation, when a writ petition is not maintainable on the date of institution but subsequently becomes maintainable, it is the discretion of the Court to rule in favour of its maintainability.

19. Responding to our query as to whether an "other authority" not under the control of the Government of India would be covered by Article 12, Mr. Garg referred to the decision in **K.S. Ramamurthy Reddiar vs. Chief Commissioner, Pondicherry**[44] wherein it has been held that all authorities within the territory of India whether under the control of the Government of India or the

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40 AIR 1956 SC 213
41 2007 SCC OnLine Cal 264
42 (2013) 8 SCC 345
43 1991 Supp (1) SCC 520
44 AIR 1963 SC 1464

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Government of various States and even autonomous authorities which may not be under the control of the Government at all can be considered as "State" under Article 12. Paragraph 6 of the decision in **Rajasthan State Electricity Board, Jaipur vs. Mohan Lal**[45] was also referred to in this connection.

20. Before concluding his submission on the point of maintainability, Mr. Garg sought to explain how the decision of this Court in **Mrinmayee Rohit Umrotkar vs Union of India and Ors.**[46] is distinguishable on facts. In this decision, a coordinate Bench of this Court had held that IDBI Ltd. is not a Government of India undertaking. According to him, the Court was not concerned with the question as to whether IDBI Ltd. is a "State" within the meaning of Article 12 but was seized of the question as to whether for the purpose of admission in medical colleges, IDBI Ltd. could be regarded as a "Government undertaking" and children of employees working in IDBI Ltd. could claim exemption under clause 4.8.1 of the Medical Entrance Information Brochure pertaining to NEET UG – 2020. He submitted that such decision, answering the question in the negative, was rendered on the basis of written instructions placed before the Court by the learned Additional Solicitor General but no submission was advanced by him that IDBI Ltd. is not a "State" under Article 12. Referring to paragraph

[45] AIR 1967 SC 1857
[46] 2020 SCC OnLine Bom 3664

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20 of the said decision, it was submitted that although the Court held IDBI Ltd. not to be a "Government company" within the meaning of section 2(45) of the Companies Act, 2013, IDBI Ltd. is a "Government company", pursuant to acquisition by LICI, by virtue of the deeming fiction under section 139(7) of the said Act.

21. Mr. Garg was also heard by us on the merits of the writ petition but we would be required to consider the merits once the Association crosses the hurdle of maintainability.

SUBMISSIONS ON BEHALF OF IDBI LTD.

22. Appearing on behalf of IDBI Ltd., Mr. Sudhir Talsania, learned senior counsel, while tracing the genesis of the Development Bank and commenting on the activities that it had to perform submitted that in 1964, it was felt that the existing arrangements for the provisions of credit for expansion and development of industry was not adequate in relation to the needs of enterprises or projects. It was, therefore, proposed that a new institution to be known Industrial Development Bank of India be established, which shall be a wholly owned subsidiary of the RBI and would be managed by the Board of Directors consisting of persons who were for the time being members of the Central Board of the Reserve Bank[47]. Accordingly, the IDBI Act was enacted[48].

[47] Page 1 of the Convenience Compilation filed by Association
[48] Page 2 of the Convenience Compilation filed by Association

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23. Mr. Talsania drew our notice to various provisions of the IDBI Act. Section 3 was referred to, which provided for establishment of a corporation to be known as the Industrial Development Bank of India. Chapter III of the Act was placed which dealt with management of the Development Bank and, *inter alia*, provided that the general superintendence, direction and management of the affairs and business of the Development Bank would vest in the Board of Directors consisting of such persons who, for the time being, held office as directors on the Central Board of RBI. The Governor of RBI would be the Chairman whereas its Deputy Governor would be the Vice Chairman. Chapter IV, which made provisions for business of the Development Bank was next placed. Moving further, reference was made to section 10 which provided that the Central Government may, after due appropriation made by the Parliament by law in this behalf, advance to the Development Bank an interest free loan and also such further sums of money by way of loans on such terms and conditions as may be agreed upon. Section 11 was next referred which empowered the Development Bank, for the purpose of carrying out its functions under the IDBI Act, to issue and sell bonds and debentures with or without guarantee of the Central Government and also to borrow money from the RBI as provided therein. It further provided that the Central Government could, on a request being made to it by the Development Bank, guarantee the bonds and debentures

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issued by it (the Bank) as to the repayment of principle and payment of interest. Section 12 which permitted the Development Bank to borrow money from any bank or financial institutions in any foreign country after previous consent of the Central Government and section 13 which permitted the Development Bank to receive gifts, grants, donations or benefactions from Government or any other source was further placed. Further attention was drawn to Chapter V providing for establishment of a special fund to be known as Development Assistance Fund and the manner in which the amounts would be credited and debited to the funds as well as utilization thereof. Then, section 22 was placed which provided for the establishment of a reserve fund, to which the amount out of annual profits accruing to the General Fund, could be transferred as deemed fit by the Development Bank. Finally, section 35 was referred to which provided that the Development Bank would not be liable to any income tax, super profit tax or any other tax in respect of any income, profit, gains, etc.

24. Thus, according to Mr. Talsania, the Development Bank was a statutory corporation operating under direct supervision and control of the Central Government and RBI.

25. Mr. Talsania, however, submitted that with the changes in economic environment, the flow of funds to financial institutions (hereafter 'FIs', for short) from RBI's National Industrial Credit Long Term Operations and

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allocation of statutory liquidity ratio bonds dried up and it became necessary for the FIs to raise funds mainly from markets. Simultaneously, commercial banks also began to provide project finance and these commercial banks had lower cost of funds than the FIs. Narsimhan Committee-II suggested that the FIs should ultimately convert into commercial banks or non-banking financial companies. The Khan Working Group set up by RBI also recommended that the development financial institutions should be allowed to convert into banks at the earliest. Accordingly, the Finance Minister in his speech on budget for the financial year 2002-2003 proposed to make legislative changes to corporatize the Development Bank within the coming year to provide flexibility[49].

26. Pursuant to this announcement, Mr. Talsania submitted, the IDBI Repeal Act was enacted which transferred and vested the undertaking of the Development Bank to and in the company, i.e., IDBI Ltd. The preamble to the IDBI Repeal Act states that it an Act to provide for the transfer and vesting of undertaking of the Development Bank to and in a company to be formed and registered under the Companies Act, 1956 to carry on banking business and for matters connected therewith or incidental thereto and also to repeal the IDBI Act[50].

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[49] Page 29 of the Convenience Compilation filed by Association - Statement of Objects and Reasons of the IDBI Repeal Act

[50] Page 32 of the Convenience Compilation filed by Association

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27. From the IDBI Repeal Act, it was shown to us by Mr. Talsania that it, *inter alia*, provided as follows:

> Section 3: Undertaking of Development Bank would be transferred and vested in the company [IDBI Ltd.]. It further provided that IDBI Ltd. shall carry on banking business in accordance with the provisions of the Banking Regulations Act, 1949 in addition to the business carried on and transacted by the Development Bank. With effect from 1st April 2021, this provision was also deleted by the Finance Act, 2021.
>
> Section 4: General effect of transfer and undertaking.
>
> Section 5: Provisions in respect of officers and other employees of the Development Bank.

28. The effect of the IDBI Repeal Act, according to Mr. Talsania, was that the Development Bank ceased to exist. IDBI Ltd. became a Board managed company as per its Memorandum and AoA[51]. Some of the provisions of the AoA, to which our attention was drawn, are as under:

> Article 4: Central Government being the shareholder of the company shall at all time maintain not less than 51% of the issued capital of the company.

[51] Page 38 of the Convenience Compilation filed by Association - Relevant parts of the Articles of Association as of 2004

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Article 116: The Board of Directors shall consist of directors nominated by the Central Government as follows:

(i) Chairman and Managing Director;

(ii) Two Deputy Managing Directors;

(iii) Two Whole Time Directors, liable to be retired by rotation;

(iv) Two Directors who are officials of Central Government;

(v) Two Directors having special knowledge and professional experience in science and technology, economic, industry, banking, industrial cooperation law, industrial finance, investment and accountancy and any other matter of special knowledge and expertise which is considered to be useful to the company; and

(vi) Five directors having special knowledge or practical experience of one or more of the matters specified in Section 10A(2)(a) of The Banking Act to be elected by shareholders at the general meeting of whom at least two would be other than central Government or other than banks and institutions wherein the

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majority shareholding was with the Central Government.

29. Therefore, Mr. Talsania continued, though IDBI Ltd. was a Government company, it was into banking business as per the preamble of the IDBI Repeal Act without any Government or public or sovereign functions. In this regard, it was pointed out that Mr. Garg, appearing on behalf of the Association, expressly stated that the Association was not pressing the contention that IDBI Ltd. was doing any public function. Mr. Talsania stressed that the Central Government did not provide any financial aid or assistance. The directors were nominated by the Central Government in its capacity as a shareholder of IDBI Ltd. and not for the purpose of exercising deep and pervasive control over IDBI Ltd. The transition of the Development Bank, from a statutory corporation to a Government company, was without any deep or pervasive administrative and financial control of the Central Government. IDBI Ltd. was always a banking company since the IDBI Repeal Act came into force and is being regulated by the provisions of the Banking Regulations Act, 1949 as well as various regulatory directives issued by RBI. The Board of Directors have sufficient managerial autonomy and the only control exercised by the Government is regulatory control. IDBI Ltd. does not enjoy various statutory protection that were available to the Development Bank. Therefore, IDBI Ltd. is not a "State" within the meaning of Article 12 of the

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Constitution of India and no writ petition could have been maintained against it.

30. Support for this submission was sought to be drawn from the ratio of the decision in **Pradeep Kumar Biswas** (supra) wherein, *inter alia*, it was held that the question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. When the control is merely regulatory, whether under statute or otherwise, it would not serve to make the body a "State".

31. According to Mr. Talsania, the various tests propounded in **Ramana Dayaram Shetty** (supra) and enumerated in the case of **Ajay Hasia** (supra) as well as **Pradeep Kumar Biswas** (supra) is that 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 the Government. In other words, the test of shareholding is merely one of the tests and not conclusive by itself.

32. Reliance was also placed on **Balmer Lawrie & Co. Ltd.** (supra) to support the contention that a Government company, *ipso facto*, would not be a "State" within the meaning of Article 12 of the Constitution of India unless it is discharging Governmental or public function.

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33. On the issue of disinvestment by Central Government, the budgetary speech of the Finance Minister while presenting the Union budget for 2016-2017 was referred to by Mr. Talsania, where the Minister mentioned that the Government would consider diluting its stake to below 50% in IDBI Ltd. Based on that, LICI showed interest[52] to acquire the controlling stake up to 51% in IDBI Ltd. The Central Government also conveyed its no objection to reduction in its shareholding in IDBI Ltd. below 50% and also to relinquish management control[53].

34. According to Mr. Talsania, after obtaining all the requisite approvals from Insurance Regulatory and Development Authority of India[54] (hereafter "IRDAI", for short) and RBI[55], LICI acquired 51% shares of IDBI Ltd. and the stakes of the Central Government fell below 50%. The said acquisition by LICI was subject to several conditions imposed by IRDAI as well as RBI, both being regulatory authorities. Conditions imposed by IRDAI[56], *inter alia*, are:

> (i). It is subject to all necessary regulatory approvals from RBI, SEBI and other relevant agencies.

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52 LICI's letter dated 16th July 2018, at page 50 of the Convenience Compilation filed by Association

53 Central Government's letter dated 6th August 2018, at page 54 of the Convenience Compilation filed by Association

54 IRDAI's letter dated 4th July 2018, at page 600 of the pleadings

55 RBI's letter dated 2nd November 2018, at page 601 of the pleadings

56 Page 600 of the pleadings

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(ii). LICI shall ensure that acquiring additional stakes in IDBI is done in a prudent manner such that interest of the policy holders are safeguarded and LICI shall make all efforts to maximise returns from the deal, so that the returns are commensurate with the average returns from overall investment of LICI.

(iii). LICI shall ensure that IDBI Ltd. is professionally managed under the supervision of a professional Board and LICI shall have effective oversight of the performance of the investment in IDBI Ltd. through appropriate mechanism including quarterly performance review by the Board of LICI.

The conditions put by RBI[57] are:

(i). LICI shall capitalise IDBI Ltd. adequately to ensure that it meets minimum capital requirement stipulated by the RBI to enable IDBI Ltd. to move out of Prompt Corrective Action (PCA) framework.

(ii). Government of India shall not participate in the open offer made by LICI.

(iii). Voting rights of LICI in IDBI Ltd. shall be capped at 26%.

(iv). In order to prevent any conflict of interest, LICI shall bring down its equity shareholding in other banks

[57] Page 601 of the pleadings

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to 10% or below over a period of 2 years as set out in the said letter.

(v). Composition of the Board shall comply with the provisions of the Banking Regulations Act and instructions issued by the RBI from time to time. The Board shall have a majority of independent directors.

(vi). All provisions of the Banking Regulations Act, 1949 and instructions and guidelines issued by the RBI as applicable to private banks shall also be applicable to IDBI Ltd.

(vii). Either IDBI Ltd. or LIC Housing Finance Ltd. will cease to conduct housing finance activity.

35. These conditions, Mr. Talsania contended, would clearly demonstrate that both LICI and RBI treated IDBI Ltd. as an independent company. Indeed, the conditions provided that LICI and IDBI Ltd. would not compete with each other. Further, the capital investment by LICI was from its investment fund and not from its capital base.

36. Mr. Talsania further contended that RBI issued a press note dated 14th March 2019 recategorizing IDBI Ltd. as a private sector bank.[58]

[58] RBI's Press Release dated 14th March 2019 at page 55 of the Convenience Compilation filed by Association

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37. In regard to alteration of AoA of IDBI Ltd., Mr. Talsania submitted that special resolution for alteration of AoA was passed through postal ballot on 7th November 2018[59] whereby Article 4, which provided that minimum 51% shares shall be held by the Central Government, was deleted. Article 161, enabling the President of India to give directions for efficient working of the bank, was deleted. Various other articles like constitution of Board of Directors, etc. were also amended to provide for nomination of directors by LICI.

38. The AoA was further amended effective from 10th August 2021[60]. Article 116 provides that only 2 Directors are nominated by the Central Government and LICI each and the remaining 11 Directors are independently elected by the Board of Directors. This is pursuant to the conditions imposed by RBI for granting permission to LICI to acquire 51% shares in IDBI Ltd.[61]. In fact, it is expressly required that the composition of the Board of Directors of IDBI Ltd. would have majority of independent directors[62]. Thus, based on the composition of the Board, it cannot be contended that the Central Government has any deep or pervasive control.

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59 Page 67 of the Convenience Compilation filed by Association

60 Amended Articles of Association as applicable today are at page 1 of the Convenience Compilation filed by IDBI Ltd.

61 Page 601 of the pleadings, more particularly Condition No. 3

62 Page 602 of pleadings, more particularly Condition No. 7

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39. Mr. Talsania strongly urged that upon disinvestment, IDBI Ltd. ceased to be a Government company under the provisions of the Companies Act, 2013. However, dealing with the argument of Mr. Garg that the shareholding of the Central Government and LICI, which is in itself a "State" within the meaning of Article 12, would together completely dominate IDBI Ltd. and on that basis it should be considered as a "State" within the meaning of Article 12, he contended that even under the Companies Act, 1956, in view of the shareholding of the Central Government and LICI, at the highest, IDBI Ltd. would be a deemed Government company within the meaning of Section 619-B. Even then, no writ petition would be maintainable as against it. Reliance in this behalf was placed on the decision in **R. V. Dyansagar v. Maharashtra Industrial & Technical Consultancy Organisation**[63].

40. Mr. Talsania further contended that the question whether IDBI Ltd. is a "State" within the meaning of Article 12 of the Constitution of India or whether a writ would lie against it, is no longer res integra and is settled by decisions of this Court as well as other high courts.

41. In this connection, reliance was first placed on the decision of this Court in **Mrinayee Rohit Umrotkar** (supra). According to Mr. Talsania, this decision has been sought to be distinguished by Mr. Garg on the basis that, in

[63] 2003 (2) Mh.L.J. 547

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the facts of that case, this Court was concerned with whether IDBI Ltd. was a Government of India undertaking and that too for the purpose of admission to the MBBS course and has no similarity to the issue involved in the present proceedings. However, he contended that the observations of this Court are sufficient to conclude that IDBI Ltd. is not a "State" within the meaning of Article 12 of the Constitution of India. In particularly, he highlighted the observations of this Court to the effect that transition of IDBI Ltd. from the Development Bank was without deep and pervasive control of the Central Government. This is a test which is duly considered in paragraphs 19 and 20 of **Mrinayee Rohit Umrotkar** (supra) and IDBI Ltd. is expressly held as not a "State" within the meaning of Article 12 of the Constitution of India.

42. Next, Mr. Talsania relied on the decision of the Calcutta High Court in **Debashish Mukherjee v. IDBI Ltd.**[64] wherein the decision in **Mrinayee Rohit Umrotkar** (supra) has been expressly referred to and followed.

43. A short order of the Calcutta High Court in **Kundan Prasad v. Union of India**[65] holding that IDBI Ltd. has been categorised as a private sector bank by the RBI and hence it would not be amenable to writ jurisdiction was further placed before us.

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[64] Judgement and Order dated 11th February 2021 in WPA 5016 of 2020 with CAN 1 of 2020

[65] Order dated 11th June 2019 in W.P. No. 8736 (W) of 2019

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44. The decision of the Kerala High Court [Bench at Ernakulam] in **Unimoni Financial Services Ltd. v. IDBI Bank Ltd.**[66] was the next decision on which Mr. Talsania relied. Therein, the Court took the view that even if IDBI Ltd. is a public sector bank [which is factually not correct as on the date of the judgement], for enforcement of demand not involving any element of public duty, a writ petition would not be maintainable.

45. Moving on further, Mr. Talsania forcefully contended that neither the pleadings in the writ petition nor the documents tendered subsequently in Court by the Association demonstrate that IDBI Ltd. is a "State" within the meaning of Article 12 of the Constitution of India. The Association has pleaded[67] that the Central Government holds 51% equity share capital of IDBI Ltd. IDBI Ltd. is under administrative control of the Central Government which issues instructions from time to time and all policies of IDBI Ltd. are subjected to the extant guidelines, directives and instructions laid down by them. IDBI Ltd. being owned by the Central Government, like other public sector banks, is an instrumentality of the "State" within the meaning of Article 12. The Association has in no way elaborated or established or demonstrated which policies and directives and instructions issued by the Central

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[66] Judgement and Order dated 16th December 2020 in WP (C) No. 17635 of 2020

[67] Paragraph 1 of the Writ Petition at page 4

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Government were required to be followed by IDBI Ltd. establishing deep and pervasive control of such government.

46. It was further pointed out by Mr. Talsania that the Association has tried to submit that in view of the majority of directors nominated by the Central Government, there is total control over the Board and thus the Central Government exercises deep and pervasive control. In response to this, Mr. Talsania submitted that IDBI Ltd. has, in its affidavit in reply dated 8th October 2012, clearly pleaded that the Board of Directors enjoys complete autonomy and freedom in deciding managerial issues which fact is not disputed by the Association. Moreover, it is submitted that nomination of directors by the Central Government is on the basis of its shareholding in the IDBI Ltd. and not for the purpose of exercise of deep and pervasive control over the functions of IDBI Ltd. as admittedly it does not exercise any Governmental or public functions. As can be seen from the subsequent event, the moment the Government disinvested its stake in IDBI, the number of nominated directors came down to just two.

47. Mr. Talsania was next heard to submit that although not a part of the pleadings, nor supported by any affidavit, the Association has inserted documents in a convenience compilation. The Association has relied upon documents[68]

[68] Page 80 and 81 of the Convenience Compilation filed by Association

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relating to further disinvestment by both the Central Government as well as LICI to contend that till as late as 2021, the Central Government had managerial control over IDBI Ltd. However, as argued by him before, the Central Government never exercised direct managerial control and that IDBI Ltd. was always governed through its Board of Directors. In any case, while responding to LICI's proposal for acquisition in IDBI Ltd., the Central Government had, vide letter dated 6th August 2018, already conveyed its no objection to relinquish management control in IDBI Ltd.[69]. Thus, the documents now referred to by the Association are merely a reiteration of the Government decision taken in 2018 itself.

48. Mr. Talsania further urged us to note that even as on date, the correspondence of the Central Government would indicate that there is no deep or pervasive control. In this regard, reliance was placed on a document dated 20th July 2021 addressed to the Finance Minister by a member of Parliament referring certain grievances of the employees of IDBI Ltd. The said representation was not entertained noting that IDBI Ltd. is a private sector bank[70].

49. Mr. Talsania then brought to our notice that for the purpose of allocating targets under the Pradhan Mantri Mudra Yojna for financial year 2021-22, the Ministry of

[69] Page 54 of the Convenience Compilation filed by Association
[70] Page 172 of the Convenience Compilation filed by IDBI Ltd.

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Finance has considered IDBI Ltd. as a private sector bank as is clear from the communication dated 10th June 2021.[71]

50. On the issue of financial aid and budgetary allocation, Mr. Talsania once again pointed out the lack of pleadings in the writ petition. According to him, without any averments or pleadings, the Association has relied upon (i) Document dated 3rd September 2019 being cabinet approval for infusion of capital of Rs.4557 crore and (ii) the budget speech for 2021-22 delivered on 1st February 2021 wherein, the Finance Minister has referred to infusion of capital of Rs.4557 crores in the IDBI Ltd.

51. Mr. Talsania asserted that this reference is clearly misleading in view of the following facts:

(i) Clause 4.1.1 of the RBI Master Circular[72] on Prudential Guidelines on Capital Adequacy and market discipline – New Capital Adequacy Framework *inter alia* requires that Banks are required to maintain minimum capital to Risk - weighted Asset ratio (CRAR) of 9% on an ongoing basis.

[71] Page 175 of the Convenience Compilation filed by IDBI Ltd.
[72] Page 6 of the Convenience Compilation filed by IDBI Ltd.

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(ii) Vide Circular dated 13th April 2017, the RBI provided for Revised Prompt Corrective Action (PCA) Framework for Banks[73].

(iii) In view of high net NPA and negative RoA, the RBI placed IDBI Ltd. under PCA vide communication dated 5th May 2017[74]. One of the corrective measures required was that the promoters/owners were required to bring in more capital. Further restrictions were imposed by the RBI vide communication dated 23rd February 2018[75].

(iv) Owing to its financial health, IDBI Ltd. was unable to meet the Regulatory Capital requirement as was mandated by clause 4.1.1. of the Master RBI Circular referred to hereinabove. Further, in consonance with the directives contained in the PCA framework requiring promoters/shareholders to bring in more capital, IDBI Ltd. had no other realistic option except to seek more funds from its shareholders. In fact, RBI while granting approval for acquisition by LICI[76] had specifically put a condition that LICI

[73] Page 147 of the Convenience Compilation filed by IDBI Ltd.
[74] Page 148 of the Convenience Compilation filed by IDBI Ltd.
[75] Page 150 of the Convenience Compilation filed by IDBI Ltd.
[76] Page 600 of the pleadings

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would capitalise IDBI Ltd. adequately to ensure it meets minimum capital requirement.

(v) Accordingly, *inter alia*, by a letter dated 31st August 2019[77], IDBI requested LICI for infusion of funds in order to meet its regulatory capital requirements. IDBI informed that the estimated requirement for regulatory capital was Rs.9,300 crore and that it was in the process of seeking an amount of approximately Rs.4,557 crore from the Central Government. Subsequently, by its letter dated 5th September 2019[78], IDBI Ltd. informed LICI that the Central Government had approved the proposal for infusion of capital and was willing to subscribe Rs.4,557 crore while the balance Rs.4,743 crore was to be subscribed by LICI.

(vi) Thus, by its letter dated 11th September 2019[79], LICI informed IDBI Ltd. that it would infuse funds to the extent of Rs.4,743 crores as Preferential Issue of Equity Shares subject to prior infusion by the Central Government. It is in this contextual background that the Central Government, by its letter dated 16th September 2019[80], informed the release of Rs.4,557 crore to IDBI Ltd. towards

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77 Page 151 of the Convenience Compilation filed by IDBI Ltd.
78 Page 153 of the Convenience Compilation filed by IDBI Ltd.
79 Page 155 of the Convenience Compilation filed by IDBI Ltd.
80 Page 156 of the Convenience Compilation filed by IDBI Ltd.

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contribution of the Central Government in preferential allotment of equity shares.

52. Reliance was also placed on the Special Resolution for Preferential Issue of Equity Shares to LICI and the Central Government, which was passed through postal ballot on 27th October 2019[81]. It, in terms, provides that the said subscription was to shore up IDBI Ltd.'s capital in compliance of mandatory regulatory norms.

53. In this context, Mr. Talsania submitted that the Association's attempt to highlight the infusion of funds to suggest that there is Government control is completely misleading and erroneous. It is submitted that the infusion of capital was not by way of financial assistance or finance to meet expenditure or aid to IDBI Ltd. It is not the case that the Central Government provides any sort of grants or financial aid to IDBI Ltd. but that it has merely provided funds to meet its regulatory obligations in its capacity as a shareholder as required by the RBI. The said funds have been provided as against allotment of preferential shares.

54. Mr. Talsania mentioned that a similar requirement for infusion of funds arose to meet the regulatory capital requirement in the subsequent year as well. However, when the said request was made to the Central Government, the same was impliedly turned down by the Central

[81] Page 159 of the Convenience Compilation filed by IDBI Ltd.

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Government by its letter dated 17th July 2020[82]. In the said letter, the Central Government made it abundantly clear that the infusion of capital of Rs.4,557 crore made in September 2019 was a one-time measure. Finally, IDBI Ltd. was able to generate funds through a QIP process by which it raised an amount of Rs.1,435 crores[83]. It was submitted that the Central Government did not invest any amount whatsoever during this round. Finally, by a letter dated 10th March 2021[84], RBI informed IDBI Ltd. that in view of its subsequent performance, a decision had been arrived at to take out IDBI Ltd. of the PCA framework.

55. While dealing with a few pages of the annual report of IDBI Ltd. for the year 2021-22, which the Association pushed as late as at the stage of Mr. Garg's address in rejoinder to contend that IDBI Ltd. was complying with the extant guidelines of the Central Government on reservation in service as applicable to public sector banks, Mr. Talsania submitted without prejudice to his objection that such a document cannot be entertained at the stage of rejoinder and that too without any notice to IDBI Ltd. that as previously submitted by him the Development Bank was a statutory corporation and was liable to follow the reservation policy of the Central Government. Section 5 of the Repeal Act enabled the Board of Directors to continue

[82] Page 165 of the Convenience Compilation filed by IDBI Ltd.
[83] Page 166 of the Convenience Compilation filed by IDBI Ltd.
[84] Page 168 of the Convenience Compilation filed by IDBI Ltd.

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and/or alter the service conditions after transfer of the employees from the Development Bank to IDBI Ltd. Apparently, the Board has not altered the reservation policy. Merely because IDBI Ltd. is following reservation policy, it cannot lead to a conclusion that IDBI Ltd. is a "State" within the meaning of Article 12.

56. On the question of relevance of the date of institution of the writ petition, Mr. Talsania contended that the Association's plea is that the cause of action in the present case arose in 2012 and since then the writ petition is pending before this Hon'ble Court; hence, the position as prevailing in the year 2012 must apply.

57. In this regard, Mr. Talsania repeated his earlier submission that view of the Repeal Act IDBI Ltd. was not a "State" within the meaning of Article 12 of the Constitution of India in the year 2012.

58. Without prejudice to the above submission, Mr. Talsania submitted that the writ remedy under Article 226 is not a remedy conferred by any statute but is an extraordinary and discretionary remedy conferred by the Constitution. The primary condition for exercise of writ jurisdiction under Article 226 of the Constitution of India is that as on the date of exercise of writ jurisdiction by the High Court, the party against whom the writ is being issued must be amenable to the writ jurisdiction of the said high court. Mere institution or admission of a writ petition does

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not conclude that the writ petition is maintainable or that the petitioner has any vested right to have the writ petition maintained. The change of position in the status of the respondent by operation of law or otherwise would make a pending writ petition incapable of being considered on merits. It was submitted that it is trite that a company cannot be resurrected to the position of being a "State" or an instrumentality of the "State", notwithstanding the disinvestment by the Government.

59. The decision of this Court in **Tarun Kumar Banerjee vs. Bharat Aluminium Company Limited & Anr.**[85], was cited by Mr. Talsania. There, this Court was concerned with a writ petition filed against Bharat Aluminium Company Limited ("BALCO"), hitherto a Government of India enterprise. After the filing of the writ petition, BALCO was privatized and the shareholding was transferred. At the time of hearing of the writ petition, an objection was taken that BALCO was no longer amenable to the writ jurisdiction of this Court. The said objection was upheld and the writ petition dismissed.

60. The decision of the Delhi High Court in **Asulal Loya vs. Union of India & Anr.**[86], was next cited which also considered a similar question of law. In the facts of that case too, a preliminary issue was raised by the respondent

[85] Writ Petition No. 1461 of 2003
[86] 2008 (106) DRJ 100

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company that the writ petition was no longer maintainable and no relief could be granted against the respondent company as it was not a "State" or an authority under Article 12 of the Constitution of India in view of the disinvestment of the Central Government in the respondent company. It was argued on behalf of the petitioner therein that when the writ petition was originally filed against the respondent company, it was maintainable; hence, it would be unjust and unfair to non-suit the petitioner after so many years. It was also argued that the ordinary rule of litigation is that rights of the parties stand crystallized on the date of commencement of litigation and right to relief should be decided with reference to the date on which the petitioner entered the portals of the Court. The said contention of the petitioner therein was negated by the Delhi High Court and the writ petition came to be dismissed.

61. Mr. Talsania thereafter cited the judgment dated 7th September 2009 of a coordinate Bench of this Court in **Mahant Pal Singh vs. Union of India & Ors.**[87], where it was seized of a writ petition filed against the Videsh Sanchar Nigam Ltd. ("VSNL"), a public sector undertaking. However, due to the disinvestment that took place, this Court held that VSNL was not amenable to its writ jurisdiction. The same view was reiterated by this Court in

[87] Writ Petition No. 2139 of 2007

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Jatya Pal Singh vs. Union of India & Ors.[88] vide its order dated 8th September 2009.

62. Both these decisions were challenged before the Supreme Court of India and in **Jatya Pal Singh vs. Union of India & Ors.**[89], the views of this Court were upheld.

63. The decisions relied upon by Mr. Garg on behalf of the Association in support of maintainability of writ petitions post disinvestment were sought to be distinguished by Mr. Talsania by submitting that the same arose out of different facts and were, thus, inapplicable.

64. Mr. Talsania submitted that in **Ashok Kumar Gupta** (supra), the Calcutta High Court was concerned with an appeal wherein a writ petition was already allowed. In other words, the Court had already exercised writ jurisdiction. It was during the pendency of the appeal proceedings, that the status of the respondent company changed. It was not a case, as the present, wherein the writ was yet to be issued.

65. The Association, it was submitted, had relied upon paragraph 5 of the decision in **Rajamundry Electric Supply Corporation Ltd.** (supra) to contend that the Supreme Court has held that the validity of a petition must be judged on the basis of the facts as they were at the time

[88] Writ Petition No. 2652 of 2007
[89] (2013) 6 SCC 452, at paragraph 39

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of filing. However, the reference to the word 'petition' is to a company petition and the change in facts was that certain members who had consented to the filing of the petition as required, had subsequently withdrawn the said consent. Therefore, the ratio of such decision has no bearing on the facts of the present case.

66. Mr. Talsania next submitted that the decision in **T. N. Rugmani** (supra) has no application whatsoever in the facts of the present case being concerned with facts which are too dissimilar.

67. Similarly, referring to paragraph 31 of the decision in **Balmer Lawrie & Co. Ltd.** (supra), Mr. Talsania submitted that the same was in the context of moulding of reliefs in view of subsequent events.

68. The part of the decision of the Supreme Court of India in **Beg Raj Singh v. State of U.P.**[90] relied upon by the Association, Mr. Talsania contended, was misconceived inasmuch as it is not merely due to passage of time that the Association has become disentitled to a writ but on account of change of the status of IDBI Ltd. In the facts of that case, the delay was in the context of delay in deciding the petitioner's challenge to the period of lease on account of which the lease period itself ran out.

[90] (2003) 1 SCC 726

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69. Before concluding his submission on the relevant point, Mr. Talsania contended that a statutory remedy, which guarantees an adjudication by the court before whom it is instituted, stands on a materially different footing than that of a remedy provided by the Constitution where a writ could be issued at the court's discretion only in relation to certain entities. It was further contended that the status of the respondent receiving a writ is material and, in the event, that the respondent, as on the date of issuance of the writ, is found to be no longer amenable to the writ jurisdiction, no writ can be issued.

70. Finally, Mr. Talsania challenged the locus and *bona fide* of the Association in instituting the writ petition. It was pointed out that in its affidavit-in-reply, IDBI Ltd. has *inter alia* raised an objection in relation to the locus of the Association to maintain the writ petition. While the Association has contended that they are filing the writ petition in a representative capacity, IDBI Ltd. has pointed out that, across India, there are 17 different associations who represent different employees[91].

71. In the year 2012 itself, IDBI Ltd. had contended that it was evident from the record that all officers were not supporting the Association, *inter alia*, on the basis that after the implementation of the NPS scheme, 1500 officers had already applied for opening a Permanent Retirement

[91] List of associations, at page 203 of the pleadings

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Account Number ("PRAN") and around 800 accounts were already opened[92].

72. In fact, not a single employee has approached this Court to contend that he had joined IDBI Ltd. on an understanding that he would be governed by IDBI Pension Rules 2004. As indicated vide statement as referred to above, more than 90% of the officers who have joined between 2008 and 2012 have accepted the Scheme by opening PRAN[93].

73. It was *inter alia* in view of these objections, that by an order dated 1st February 2013 this Court called upon the Association to disclose the names of employees who are members of the Association. Shockingly, by a letter dated 5th February 2013[94], the Association asked for details of the officers from IDBI Ltd. itself. Thus, it is clear that they are unaware of the identity of their own members and that the writ petition is not filed in a representative capacity.

74. Ultimately, the Association disclosed names of 3894 alleged members. Even in the list of 3894 members, there were several employees who were provident fund optees, those belonging to the old pension scheme, employees who had left the services of the bank, apart from there being duplicate entries. Thus, even the list, which was produced,

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92 Page 171 of the pleadings
93 Page 184 of the Convenience Compilation filed by IDBI Ltd.
94 Page 325 of the pleadings

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was completely inaccurate. It was further pointed out that in all, 7061 employees were recruited between 1st April 2008 till 18th April 2012. Thus, on their own showing, the Association was not representing most of the employees of IDBI Ltd.

75. The aforesaid facts and figures, according to Mr. Talsania, clearly establish that the present writ petition is clearly academic in nature. In fact, the writ petition was filed with an oblique motive which is evident from the pleadings and documents produced by IDBI Ltd.[95] wherein the Association has attempted to incite the employees in order to scuttle the NPS as well as adopted coercive measures like calling for a strike and demonstrations, even during the pendency of the writ petition.

76. In view of the aforesaid, it has been submitted by Mr. Talsania that the Association is not entitled to any equitable and discretionary relief and the writ petition itself being not maintainable, is liable to be dismissed.

THE QUESTION ARISING FOR DECISION

77. In view of such preliminary objections to the maintainability of the writ petition instituted by the Association, we are primarily tasked to decide whether these writ petitions are maintainable against IDBI Ltd. as on date the same were presented; if yes, whether any writ

[95] Pages 412-413 of the pleadings along with the Association's correspondence at pages 417 and 421

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would lie against IDBI Ltd. after it ceased to be a Government company and came to be categorized as a 'private sector bank' by RBI assuming that the Association has a sound case on merits.

THE ASSOCIATION'S WRIT PETITION AND THE PLEADINGS

78. Since the writ petition instituted by the Association has been the lead matter and argued by the parties extensively, we propose to consider the same first.

79. A decision on whether IDBI Ltd. is a "State" within the meaning of Article 12 of the Constitution would necessarily require taking note of the averments in (i) the writ petition instituted by the Association, (ii) its rejoinder-affidavit to the reply affidavit of IDBI Ltd. and (iii) an additional affidavit, as well as the reply-affidavits of IDBI Ltd. to the writ petition and the additional affidavit of the Association, to trace how the Association has sought to establish that IDBI Ltd. is a "State" and how IDBI Ltd. has countered the same.

80. It has been averred in the writ petition as follows: -

> "1. *** Respondent No.2 is a bank recognised as 'other public sector bank' having its registered office at the address mentioned in the cause title hereto. Respondent No.2 was initially established as a Statutory Corporation by the name of Industrial Development Bank of India, under the Industrial Development Bank of India Act, 1964. By virtue of the Industrial Development Bank (Transfer of Undertaking

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and Repeal) Act, 2003, read with notification dated 29th September, 2004 issued by Central Government in exercise of the powers conferred under section 3(1) of the Transfer Act, the undertaking of the IDBI had been transferred to and vested in the IDBI, a company incorporated under the Companies Act, 1956 and also a Banking Company within the meaning of section 5(c) of the Banking Regulation Act, 1949 with effect from the appointed day i.e, 1st October 2004. The Government of India holds more than 51% of the equity share capital of the Respondent Bank. As the IDBI Bank is under the administrative control of Department of Financial Services, Ministry of Finance, Government of India, the Secretary, Department of Financial Services, Ministry of Finance, Government of India issues instructions from time to time to the respondent Bank and all the policies of Respondent Bank are subject to the extant guidelines, directives and instructions laid down by the Government of India The Respondent Bank being owned by Government of India like other public sector banks/public financial institutions is an instrumentality of the state within the meaning of Article 12 of the Constitution of India and is amenable to the writ jurisdiction of this Court. Respondent No.3 is the Chairman of Pension Fund Regulatory and Development Authority (hereinafter 'the PFRDA', for short) which is an authority constituted pursuant to resolution passed by the Ministry of Finance (Union of India) in order to implement budget announcement relating to introducing a new restructured defined contribution pension system for new entrants to Central Government Service for replacing the then existing system of Defined Benefit Pension system. The PFRDA is under the overall administrative control of the Ministry of Finance (Unit of India).

(ii) IDBI Ltd. in its reply-affidavit has stated as follows: -

"2. At the very outset, I say that the present writ petition ought to be dismissed at the threshold on the

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following amongst other grounds which are taken without prejudice to the one another:

(a) Respondent No.2 Bank is not amenable to writ jurisdiction in as much as it is not a State or an instrumentality of a State or a body which falls within the purview of Article 12 of the Constitution of India. Although the Respondent No.2 Bank was initially a statutory corporation, by virtue of Industrial Development Bank of India (Transfer of Undertaking and Repeal) Act, 2003 the same was incorporated as a Company under the provisions of the Companies Act, 1956 with effect from 1st October, 2004. The same was done in view of the advent of globalization and severe competition being faced by the Respondent No.2 Bank from several banks and the need for giving the Respondent No.2 Bank sufficient autonomy to operate at par with the other banks without being bogged down by governmental control. The company therefore runs on the basis of its Memorandum and Articles of Association and the day to day business of the Respondent No.2 Bank is conducted by its Board of Directors who enjoy sufficient managerial autonomy. Thus, the Government does not have deep or pervasive control over the running of the Respondent No.2 Bank. The only control that is exercised by the Government is regulatory control, which is akin to the control, exercised over any other public sector bank. Further, even the share-holding pattern would indicate that the Central Government is not the sole share-holder of the Respondent No.2 Bank. In any case, the Government itself has issued various circulars for providing managerial autonomy for public sector Banks, which implies that the Board of Directors is vested with the freedom and responsibility for deciding managerial issues. The respondent no.2 Bank is in the business of banking services and does not discharge any sovereign functions. In

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view of the aforesaid, it is submitted that the respondent no.2 is not amenable to writ jurisdiction and on this ground alone this writ petition ought to be dismissed".

(iii) Paragraph 5 of the rejoinder-affidavit of the Association deals with paragraph 2(a) of the reply-affidavit of IDBI Ltd. It reads:

"5. With reference to para 2 (a) of the affidavit, I deny that Respondent No.2/Bank is not amenable to writ jurisdiction or that it is not a state or an instrumentality of a state or a body, which falls within the purview of Article 226 of Constitution of India. Under the Industrial Development Bank of India Act, 1964, the IDBI was established as the principal financial institution for coordinating, in conformity with national priorities the working of institutions engaged in financing, promoting and developing industries, for assisting development of such institutions for providing credit or other facilities for the development of industries or the matter connected therewith. I say that the developmental functions were state functions and the IDBI was hence formed as a statutory corporation as an instrumentality of state. While it is true that under the Industrial Development Bank (Transfer of Undertaking and Repeal) Act, 2003, the aforesaid IDBI Act, 1964 was repealed and the IDBI was transferred and vested in the company to be formed and registered under Companies Act, 1956. However, even after the repeal pursuant to the Repeal Act and formation of the Company, Respondent No. 2 continues its development bank functions and continues to be instrumentality of the state. Indeed, the banking license was given by the Government of India and not by the Reserve Bank of India, particularly since Industrial Development Bank of India was mandated to attend to the commercial banking activity in addition to the existing development bank

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functions. Accordingly, Reserve Bank of India categorized, IDBI under a new group: 'other-public sector bank' and did not club the 2nd Respondent with existing public sector banks. As long as Respondent No.2 continues to perform the developmental functions, which are functions of the state, it acts as an instrumentality of the state. Moreover, the share-holding pattern, the Memorandum of Association, the Articles of Association all indicate a deep and pervasive control of the Government in the existence and the functioning of Respondent No.2. The following salient features of the Memorandum of Association and the Articles of Association amongst other documents dealt with, subsequently, indicate not only that the developmental function continues to be performed and the 2nd Respondent continued to be an instrumentality of the state but the Government continues to maintain deep and pervasive control.

i) One of the main objects of the Company to be pursued on it's incorporation is to finance, promote or develop industry and assist in the development of industry, *inter alia*, as prescribed most specifically in the Memorandum of Association.

ii) Under the Articles of Association, it is mandated that the Central Government being a share holder of the company shall at all times maintain not less than 51% of the issued capital of the company. In fact, as per the present share holding pattern i.e., as on 30.06.2012, the Government of India holds 70.52% of the paid-up share capital of the Company.

iii) The subscribers to the Articles of Association are the President of India, Chairman cum Managing Director of IDBI (nominated by the Government of India), Additional Secretary (Financial Sector, Government of India), Chairman (Life Insurance Corporation of India), Joint Secretary (Banking and Insurance, Government of India), Joint Secretary (Banking Operations, Government of India) and Joint Secretary (Government of India Ministry of Finance

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Economic Affairs).

iv) The Board of Directors of the Company as per the Articles of Association has a minimum number of three and a maximum number of twelve persons out of which, as per the Article, the Chairman on whole time basis is to be appointed by the Central Government and designated as Chairman and Managing Director.

v) Two whole time Directors are to be nominated by the Central Government designated as Dy. Managing Directors.

vi) Two Directors shall be the officials of Central Government nominated by the Central Government.

vii) Two Directors are to be persons having special knowledge and professional experience etc., which in the opinion of the Central Government would be useful to the Company and nominated by the Central Government.

viii) Five Directors having special knowledge of matters specified in Section 10-A(2)(a) of the Banking Regulation Act to be elected by share holders at the general meeting of whom at least two directors shall be elected by share holders other than Central Government and other than Banks and institutions, which majority in share holding with the Central Government.

ix) From the above pattern, it can be seen that only two Directors are to be appointed, who are either not nominated by the Central Government or over whose appointment the Central Government has no say.

x) That notwithstanding anything contained in the Articles, the Central Government has the right to terminate the term of office of the Chairman and whole time Directors any time before the expiry of their term.

xi) That the Chairman and whole Directors are to receive salary and allowances as determined by the Central Government.

xii) That the Chairman of its Board of Directors is to be

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appointed by the Central Government on whole time basis and is to be entrusted with the management of the whole of the affairs of the company.

xiii) That notwithstanding anything contained in the Articles the President of India may at any time and from time to time issue to the Board, pursuant to these Articles such orders, directives or instructions, as the President may in its absolute discretion think fit for the efficient management or conduct of the business and affairs of the company including the exercise and performance of its function in matters involving substantial public interest and in like manner may vary and annul any such directive, the Board shall give immediate effect to the directive or instruction so issued.

6. It is pertinent to mention at this juncture that the conditions of service of the employees and or any variations thereunder are subject to the approval of Central Government. The Petitioners crave leave to refer to and reply upon the Plaint in Suit No. L 1768 of @ (sic) filed by Respondent No. 2 in the Hon'ble High of Court of Judicature at Bombay and the Orders passed therein when produced.

7. It is denied that the only control that exercised by the Government is regulatory control which is akin to control exercised for any of the public sector bank. It is denied that Respondent No.2 does not discharge any sovereign functions and it is once again denied that Respondent No.2 is not amenable to writ jurisdiction."

81. The writ petition of the Association was listed before a coordinate Bench of this Court on 12th January 2021. Mr. Talsania for IDBI Ltd. had submitted, relying on the decision in **Mrinmayee Rohit Umrotkar** (supra), that the writ petition was not maintainable. It was held in such decision

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that IDBI Ltd. is not an undertaking of the Government of India. In view of the said decision being cited for the first time, learned counsel appearing for the Association sought for and was granted time to consider the same as well as to file an additional affidavit to support the maintainability of the writ petition. It is in pursuance of the order passed on 12th January 2021 that an additional affidavit dated 13th February 2021 was filed by the Association, which has since been taken on record.

82. In such additional affidavit, it is pleaded as follows: -

> "(13) I say that the order dated 8.12.2020 passed by Hon'ble Bombay High Court in Writ Petition Lodging No. 6704/2020 is not applicable to the present case. It was a writ petition filed by the Petitioner in 2020 seeking admission to M.B.B.S. course and has no similarity with the present writ petition filed by All India IDBI Officers' Association in August, 2012 challenging retrospective implementation of New Pension Scheme in IDBI Bank.
>
> (14) I say that apart from this, the reliefs as sought in the Writ Petition decided on 8th December, 2020 was only concerning admission to the MBBS Course and the issue about the IDBI Bank being a Government undertaking or not was not an issue in the said Writ Petition. Moreover, it was not in the context of any service conditions of any employee of IDBI Bank and, therefore, the said judgment or the conclusions recorded therein are totally distinguishable both on facts and on law and cannot be applied to the present case.
>
> (15) I say that apart from this, the reliefs as sought in the Writ Petition are relevant for deciding whether the Petition is maintainable in this Hon'ble Court and the position of the Writ Petition as on the date of filing of the Petition has to be seen. I further say that in the

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present Writ Petition this Hon'ble Court had passed interim orders on 12 November, 2012 in the context of the IDBI Bank forcing its employees who were covered by this Writ Petition to open Permanent Retirement Account Number (PRAN) with the Pension Fund Regulatory and Development Authority and this Hon'ble Court has passed an order that any amounts so transferred by the IDBI Bank to the PRAN account under the New Pension Scheme with PFRDA will have to be brought back by the Bank in case the Petitioners succeed.

(16) I, therefore, say that looking to the said admitted facts and documents and the legal position as set out in this additional affidavit and the pleadings in the main Writ Petition it is respectfully submitted that this Writ Petition would be thus maintainable and this Hon'ble Court can consider the Petition for the reliefs sought therein.

(17) I say that the relief as originally sought for in the Writ Petition if seen would also support the case of the Petitioner that the present writ petition is maintainable in this Hon'ble Court. I say that prayer clause (a) is challenge to the New Pension Scheme which is a policy and now an Act made by the Central Government for giving pension to everybody. I say that the answering Respondents in so far as the Constitutionality of the New Pension Scheme is the Government of India which is the Respondent No.1 in the Writ Petition. I, therefore, say that in so far as prayer clause (a) is concerned, since the relief is sought against the Union of India, the Petition would be maintainable as far as prayer clause (a) is concerned."

83. IDBI Ltd. thereafter filed a reply-affidavit dated 22nd February 2021 dealing with the additional affidavit of the Association, wherein it has been pleaded as follows: -

"4.2. Thereafter, the Industrial Development Bank

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(Transfer of Undertaking and Repeal) Act, 2003 (hereafter, 'the Repeal Act') came to be enacted which contemplated the transfer and vesting of the business of the Development Bank with the Respondent Bank which was incorporated under the provisions of the Companies Act, 1956. ***

4.3. Thus, after the formation of Respondent Bank being a company, the entire control and management vested with the Board of Directors (as against the direct governmental management). The company functioned on the basis of its Memorandum and Articles of Association and the day to day business of the Respondent Bank conducted by its Board of Directors who enjoy managerial autonomy. Further, even the share-holding pattern would indicate that the Central Government is not the sole share-holder of the Respondent Bank

4.4. By a letter dated 16.07.2018, Life Insurance Corporation of India (hereafter, 'LIC') expressed its interest in acquiring controlling stakes in Respondent Bank. By its letter dated 06.08.2018, the Central Government gave its no objection to the dilution of its shareholding and the acquisition of the majority shareholding of 51% by LIC. A copy of the letter dated 16.07.2018 and 05.08.2018 is annexed hereto and marked as Exhibit B and C respectively.

4.5. On 04.10.2018, LIC infused a capital of Rs. 2098 crores thereby acquiring 14.90% of the total shareholding of Respondent Bank and on 21.01.2019, it invested another Rs. 19,526 Crores, thereby acquiring an additional 36.10% through a preferential allotment. Further, LIC invested another Rs.4743 crore through preferential allotment during October 2019. In the month of December, 2020, Respondent Bank raised equity share capital of Rs. 1435.18 Crore through Qualified Institutional Placement (QIU). Post completion of QIP issue, the shareholding of the GoI stands at 45.48% and LIC at 49.24% as on 31.12.2020.

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4.6. It bears mention that the Respondent Blank was registered also as a 'banking company' under the provisions of the Banking Regulation Act, 1949 and had been categorized as 'Other Public Sector Bank' by Reserve Bank of India vide letter dated 15.4.2005. However, after the majority shareholding being divested from the Central Government, Respondent Bank is now re-catergorised as a 'Private Sector Bank' with effect from 21.01.2019. A copy of the Press-Release dated 14.03.2019 issued by the Reserve Bank of India (hereafter, 'RBI') in this regard is annexed hereto and marked as Exhibit D.

4.7. Consequent upon the said investment and in pursuance of the conditions stipulated by RBI vide letter dated 02.11.2018 that LIC shall exercise control over Respondent Bank through its Board, the Articles of Association (hereafter, 'the Articles') are altered and the Respondent Bank is now a professionally Board managed company. Article 4 of the Articles is deleted thereby the restriction imposed on the requirement of the Central Government holding 51% stake in Respondent Bank is expressly removed. The Articles have been amended in order to give complete power and control over the management of the Respondent Bank to its Board of Directors (Board). The composition of the Board and the manner in which the Directors would be appointed is changed to give full control and power to Board. The amended Article 116 of the Articles contemplates that the Chairman of LIC would be the ex officio non-whole time, non-executive Chairman of Respondent Bank and the whole time Managing Director two whole time Directors would be appointed by the Board, one official nominee Director would be nominated by LIC whereas 8 other Directors would be appointed by the shareholders (the majority stakeholder being LIC). Thus Respondent Bank would be under the complete control and management of the Board and not the Central Government. Even the power to terminate the Managing Director and other whole time Directors was expressly reserved only with

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Board. A certified copy of AOA of Respondent Bank consequent upon the aforesaid acquisition by LC is annexed hereto and marked as Exhibit E.

4.8. Thus, the Central Government does not have deep or pervasive control over the functioning of the Respondent Bank. The policy decisions of functioning of Respondent Bank as well as its routine administrative decisions would all be done only by the Board of Directors as is done in any other private sector company. These decisions are not required to be referred or approved or ratified by the Central Government. I submit that it is also significant to note that the RBI, which is the regulatory body governing Respondent Bank, while granting its approval to the aforesaid Respondent Bank must have a majority of independent directors and that LIC would exercise control over the Board. Similarly, the Insurance Regulatory and Development Authority of India (hereafter 'IRDAI'), which is the regulatory body for LIC in its letter dated 04.07.2018 whilst granting permission has categorically stated that Respondent Bank is to be *'professionally managed under the supervision of a professional Board and LIC shall have an effective oversight of the performance of the investment of the Bank*'. I submit that all of this clearly indicates that, akin to any other private sector company, the functioning of the Respondent Bank in terms of its day to day management is done by its Board of Directors only and the Central Government has no role to play in the same. I say that the absence of any administrative or functional control by the Central Government, much less a control which is deep or pervasive in nature, is the most pertinent indicator that Respondent Blank is not a state or an instrumentality of the state and therefore not amenable to the writ jurisdiction of this Hon'ble Court. A copy of the letter dated 04.07.2018 from IRDAI is annexed hereto and marked as Exhibit F.

4.9. I submit that there is no financial assistance as such that is provided by the Government of India to

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Respondent Bank for its functioning or day to day activities. In fact, the entire purpose of relinquishing controlling stakes and permitting acquisition by LIC was so that LIC would infuse the necessary capital for the functioning of Respondent Bank. This is, inter alia, also borne out by the RBI's letter dated 02.11.2018 which inter alia states that LIC would capitalize Respondent Bank adequately to ensure it meets the minimum capital requirements stipulated by RBI. A copy of letter dated 02.11.2018 from RBI is annexed hereto and marked as Exhibit G.

4.10. It is submitted that the Respondent Bank is in the business of financial and banking, services which are commercial in nature and undertaken for profit and commercial gain and not in discharge of any public statutory duty or function. There are a large number of other public and private sector banking companies which are engaged in the same business as Respondent Bank. Thus, there is no monopoly in enjoyed by Respondent Bank, much less a state-conferred monopoly.

4.11. I submit that Respondent Bank is no longer a Government Company within the meaning of Section 2 (45) of the Companies Act, 2013. Further Section 143 (5) of the Companies Act, 2013 provides that in case of a Government Company or '*any other company owned or controlled, directly or indirectly, by the Central Government, or by the State Government or Governments, or more State Governments, the Comptroller and Auditor General of India shall appoint the auditor under sub-section (5) or sub-section (7) of Section 139 and direct such auditor the manner in which the accounts of the company are required to be audited and thereupon the auditor so appointed shall submit a copy of the audit report to the Comptroller and Auditor-General of India which, among other things, include the directions, if any, issued by the Comptroller and Auditor-General of India, the action taken thereon and its impact on the accounts and financial statement of the company*'. The Report thus

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> submitted is studied by the Comptroller and Auditor General of India (hereafter, 'CAG') and even issue directions if necessary. However, for Respondent Bank, the CAG neither appoints the auditor nor issues directions as contemplated above."

84. We have not found any rejoinder affidavit of the Association to the reply-affidavit dated 22nd February 2021 of IDBI Ltd. on record.

OBSERVATIONS ON THE ASSOCIATION'S WRIT PETITION AND CONSIDERATION OF PRECEDENTS:

85. The Supreme Court in **Bharat Singh vs. State of Haryana**[96] dealt with writ petitions where an acquisition of land was, *inter alia*, challenged on the ground that it was a profiteering venture. The Court noted that the point was taken as an abstract point of law. There was no attempt on the part of the appellants to substantiate the point by pleading relevant facts and producing relevant evidence. The Court, thus, recorded that there was no material in the writ petitions in support of the contention of the appellants that the impugned acquisition was nothing but a profiteering venture. After so recording, the Court proceeded to observe that:

> "13. As has been already noticed, although the point as to profiteering by the State was pleaded in the writ petitions before the High Court as an abstract point of law, there was no reference to any material in support thereof nor was the point argued at the hearing of the

[96] (1988) 4 SCC 534

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> writ petitions. Before us also, no particulars and no facts have been given in the special leave petitions or in the writ petitions or in any affidavit, but the point has been sought to be substantiated at the time of hearing by referring to certain facts stated in the said application by HSIDC. In our opinion, when a point which is ostensibly a point of law is required to be substantiated by facts, the party raising the point, if he is the writ petitioner, must plead and prove such facts by evidence which must appear from the writ petition and if he is the respondent, from the counter-affidavit. If the facts are not pleaded or the evidence in support of such facts is not annexed to the writ petition or to the counter-affidavit, as the case may be, the court will not entertain the point. In this context, it will not be out of place to point out that in this regard there is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter-affidavit. While in a pleading, that is, a plaint or a written statement, the facts and not evidence are required to be pleaded, in a writ petition or in the counter-affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it. So, the point that has been raised before us by the appellants is not entertainable. But, in spite of that, we have entertained it to show that it is devoid of any merit."
>
> (emphasis ours)

86. We have quoted the relevant paragraphs from the writ petition and the several affidavits filed by the Association only to emphasize, in the light of what has been laid down in **Bharat Singh** (supra), that the Association has not placed sufficient material in its pleadings before us to establish that IDBI Ltd. is a "State" within the meaning of Article 12 of the Constitution, upon application of the tests laid down in the majority opinion in paragraph 40 of the

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decision of the Supreme Court in **Pradeep Kumar Biswas** (supra). We may profitably quote paragraph 40 of the said decision here. It reads:

> "40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia, (1981) 1 SCC 722, are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be – whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

87. Based on our aforesaid conclusion, we could have dismissed the writ petition as not maintainable. However, in course of hearing, we also had in mind the decision in **Bharat Singh** (supra) itself where despite deficiencies in the pleadings, the Court had allowed the appellants to rely on materials not traceable in the writ petition and proceeded to decide the abstract point of law on merits. Mr. Talsania could grudge that we have been generous and indulgent in granting Mr. Garg the opportunity to tender documents forming part of compilations and convenience compilations, which are not on record as part of the writ petition or the several affidavits filed by the Association.

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However, at the same time, to do justice to the cause espoused by the parties, we also extended similar opportunity to Mr. Talsania to produce documents in support of his contentions and that would be amply reflected from the recording of his submissions, as above.

88. Here, we are concerned with a dispute arising out of a service matter. It would now be our endeavor to decide the contentious issue of maintainability based on the *dicta* of the Supreme Court in respect of matters where service disputes raised by officers/employees in proceedings before the Courts required, in view of the status of the employers, as of necessity, determination of the primary question as to whether such employers were amenable to the writ jurisdiction under Article 226 of the Constitution. We would have been inclined, in the process, to attempt at leaving aside decisions where the employer is other than a company or a Government company but the demands of the case may require us to navigate through other decisions as well, not dealing with service disputes, but which deal with the aspect of maintainability.

89. More or less, all the precedents on the point as to what would be the indicative *indicia* for holding an authority/a body to be a "State" within the meaning of Article 12 of the Constitution have been noticed in **Pradeep Kumar Biswas** (supra). We, therefore, feel disinclined to refer to the same. Having read the concurring opinion of Justice K.K. Mathew in **Sukhdev Singh** (supra) as well as the opinion of Justice

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P.N. Bhagwati in **Ramana Dayaram Shetty** (supra) along with Mr. Garg, we cannot be unmindful of what has been said in paragraph 25 of the majority opinion in **Pradeep Kumar Biswas** (supra). It was observed there that such opinions could be technically characterized as *obiter dicta*, since in both the cases 'the authority' involved was a statutory corporation. However, what is noteworthy is the other observation in paragraph 25 itself that such dicta formed the *ratio decidendi* of the Constitution Bench decision in **Ajay Hasia** (supra). The tests culled out from **Ramana Dayaram Shetty** (supra) were then noted in paragraph 27. After applying the tests so formulated, the majority in **Pradeep Kumar Biswas** (supra) found the Council for Scientific and Industrial Research (CSIR) to be a "State" as defined in Article 12 of the Constitution.

90. Pradeep Kumar Biswas (supra) being the last decision of a Constitution Bench comprising 7 (seven) learned Judges of the Supreme Court till date on the aspect as to when a body could be comprehended within the meaning of Article 12, the same would guide us in arriving at an appropriate conclusion together with other decisions subsequent thereto, which we will presently consider.

91. There are 5 (five) other decisions which, though not cited by the parties, are either referred to in the decisions in **Balmer Lawrie & Co. Limited** (supra) and in **Jatya Pal Singh** (supra). While the former decision has been referred to by both the parties, the latter has been cited by Mr.

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Talsania.

92. Close on the heels of **Pradeep Kumar Biswas** (supra) followed the decision in **G. Bassi Reddy vs. International Crops Research Institute**[97], authored by Justice Ruma Pal (as Her Ladyship then was). Incidentally, the majority opinion in **Pradeep Kumar Biswas** (supra) too was authored by Her Ladyship. The appellants in **G. Bassi Reddy** (supra) were terminated employees of the respondent institute (referred to in the relevant judgment as ICRISAT). The Court traced the origin of ICRISAT and found that ICRISAT was not set up by the Government and it gives its services voluntarily to a large number of countries besides India. It is not controlled by nor is it accountable to the Government. The Indian Government's financial contribution to ICRISAT was minimal. Its participation in ICRISAT's administration was limited to 3 (three) out of 15 (fifteen) members. Since ICRISAT did not fulfil any of the tests laid down in **Pradeep Kumar Biswas** (supra), ICRISAT was held not to be a State or other authority as defined in Article 12 of the Constitution.

93. We may, at this stage, take notice of certain important observations made by the Court after considering the decisions in **Calcutta Gas Co. (Proprietary) Ltd. v. State of W.B.**[98], **Praga Tools Corpn. vs. C.A. Imanual**[99], **Andi**

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97 (2003) 4 SCC 225
98 AIR 1962 SC 1044
99 (1969) 1 SCC 585

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Mukta Sadguru S.M.V.S.S.J.M.S. Trust vs. V.R. Rudani[100], **VST Industries Ltd. vs. Workers' Union**[101] and **Sohan Lal vs. Union of India**.[102] The observations read thus:

> "25. A writ under Article 226 lies only when the petitioner establishes that his or her fundamental right or some other legal right has been infringed [*Calcutta Gas Co. (Proprietary) Ltd.]*. The claim as made by the appellant in his writ petition is founded on Articles 14 and 16. The claim would not be maintainable against ICRISAT unless ICRISAT were a 'State' or authority within the meaning of Article 12. ***
>
> 26. ***
>
> 27. It is true that a writ under Article 226 also lies against a 'person' for 'any other purpose'. The power of the High Court to issue such a writ to 'any person' can only mean the power to issue such a writ to any person to whom, according to the well-established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words 'and for any other purpose' must mean 'for any other purpose for which any of the writs mentioned would, according to well-established principles issue'.
>
> 28. A writ under Article 226 can lie against a 'person' if it is a statutory body or performs a public function or discharges a public or statutory duty. … ICRISAT has not been set up by a statute nor are its activities statutorily controlled. Although, it is not easy to define what a public function or public duty is, it can reasonably be said that such functions are similar to or closely related to those performable by the State in its sovereign capacity. The primary activity of ICRISAT is

[100] (1989) 2 SCC 691
[101] (2001) 1 SCC 298
[102] AIR 1957 529

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> to conduct research and training programmes in the sphere of agriculture purely on a voluntary basis. A service voluntarily undertaken cannot be said to be a public duty. Besides ICRISAT has a role which extends beyond the territorial boundaries of India and its activities are designed to benefit people from all over the world. While the Indian public may be the beneficiary of the activities of the Institute, it certainly cannot be said that ICRISAT owes a duty to the Indian public to provide research and training facilities. In *Praga Tools Corpn.* this Court construed Article 226 to hold that the High Court could issue a writ of mandamus 'to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest'. The Court also held that:
>
> > "[A]n application for mandamus will not lie for an order of reinstatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. (See *Sohan Lal*).
> >
> > 29. We are therefore of the view that the High Court was right in its conclusion that the writ petition of the appellant was not maintainable against ICRISAT."

94. Having noted **G. Bassi Reddy** (supra), we move on to consider **Federal Bank vs. Sagar Thomas**[103] which followed within a few months of the former decision. In **Federal Bank** (supra), the question arising for decision was whether the appellant bank was a private body or falls within the definition of "State" or local or other authorities under the control of the Government within the meaning of

[103] (2003) 10 SCC 733

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Article 12. Incidentally, the civil appeal before the Supreme Court arose out of a writ petition instituted by a dismissed employee of the appellant bank. The relevant High Court held the writ petition to be maintainable. Considering various precedents, the Court proceeded to hold that:

> "18. From the decisions referred to above, the position that emerges is that a writ petition under Article 226 of the Constitution of India may be maintainable against (*i*) the State (Government); (*ii*) an authority; (*iii*) a statutory body; (*iv*) an instrumentality or agency of the State; (*v*) a company which is financed and owned by the State; (*vi*) a private body run substantially on State funding; (*vii*) a private body discharging public duty or positive obligation of public nature; and (*viii*) a person or a body under liability to discharge any function under any statute, to compel it to perform such a statutory function."

Upon hearing arguments and counter arguments on the point of deep and pervasive control exercised by RBI and the Central Government over banking companies, the Court further proceeded to hold that:

> "26. A company registered under the Companies Act for the purposes of carrying on any trade or business is a private enterprise to earn livelihood and to make profits out of such activities. Banking is also a kind of profession and a commercial activity, the primary motive behind it can well be said to earn returns and profits. Since time immemorial, such activities have been carried on by individuals generally. It is a private affair of the company though the case of nationalized banks stands on a different footing. There may well be companies, in which majority of the share capital may be contributed out of the State funds and in that view of the matter there may be more participation or

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dominant participation of the State in managing the affairs of the company. But in the present case we are concerned with a banking company which has its own resources to raise its funds without any contribution or shareholding by the State. It has its own Board of Directors elected by its shareholders. It works like any other private company in the banking business having no monopoly status at all. Any company carrying on banking business with a capital of five lakhs will become a scheduled bank. All the same, banking activity as a whole carried on by various banks undoubtedly has an impact and effect on the economy of the country in general. Money of the shareholders and the depositors is with such companies, carrying on banking activity. The banks finance the borrowers on any given rate of interest at a particular time. They advance loans as against securities. Therefore, it is obviously necessary to have regulatory check over such activities in the interest of the company itself, the shareholders, the depositors as well as to maintain the proper financial equilibrium of the national economy. The banking companies have not been set up for the purposes of building the economy of the State; on the other hand such private companies have been voluntarily established for their own purposes and interest but their activities are kept under check so that their activities may not go wayward and harm the economy in general. A private banking company with all freedom that it has, has to act in a manner that it may not be in conflict with or against the fiscal policies of the State and for such purposes, guidelines are provided by Reserve Bank so that a proper fiscal discipline, to conduct its affairs in carrying on its business, is maintained. So as to ensure adherence to such fiscal discipline, if need be, at times even the management of the company can be taken over. Nonetheless, as observed earlier, these are all regulatory measures to keep a check and provide guidelines and not a participatory dominance or control over the affairs of the company. For other

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companies in general carrying on other business activities, maybe manufacturing, other industries or any business, such checks are provided under the provisions of the Companies Act, as indicated earlier. There also, the main consideration is that the company itself may not sink because of its own mismanagement interest of the shareholders or people generally may not be jeopardized for that reason. Besides taking care of such interest as indicated above, there is no other interest of the State, to control the affairs and management of the private companies. Care is taken in regard to the industries covered under the Industries (Development and Regulation) Act, 1951 that their production, which is important for the economy, may not go down, yet the business activity is carried on by such companies or corporations which only remains a private activity of the entrepreneurs/companies.

27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment, say the Air (Prevention and Control of Pollution) Act, 1981 or the Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance with those provisions. For instance, if a private employer dispenses with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and has issued the writ to the private bodies and the companies in that

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regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance with or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.

28. The six factors which have been enumerated in the case of *Ajay Hasia* and approved in the later decisions in the case of *Ramana* and the seven-Judge Bench in the case of *Pradeep Kumar Biswas* may be applied to the facts of the present case and see whether those tests apply to the appellant Bank or not. As indicated earlier, share capital of the appellant Bank is not held at all by the Government nor is any financial assistance provided by the State, nothing to say which may meet almost the entire expenditure of the company. The third factor is also not answered since the appellant Bank does not enjoy any monopoly status nor can it be said to be an institution having State protection. So far as control over the affairs of the appellant Bank is concerned, they are managed by the Board of Directors elected by its shareholders. No governmental agency or officer is connected with the affairs of the appellant Bank nor is any one of them a member of the Board of Directors. In the normal functioning of the private banking company there is no participation or interference of the State or its authorities. The statutes have been framed regulating the financial and commercial activities so that fiscal equilibrium may be kept maintained and not get disturbed by the malfunctioning of such companies or institutions involved in the business of banking. These are regulatory measures for the purpose of maintaining a healthy economic atmosphere in the country. Such regulatory measures are provided for other companies also as well as industries manufacturing goods of importance. Otherwise these are purely private commercial activities. It deserves to be noted that it hardly makes any difference that such supervisory vigilance is kept by Reserve Bank of India

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under a statute or the Central Government. Even if it was with the Central Government in place of Reserve Bank of India it would not have made any difference, therefore, the argument based on the decision of *All India Bank Employees' Assn., AIR 1962 SC 171,* does not advance the case of the respondent. It is only in case of malfunctioning of the company that occasion to exercise such powers arises to protect the interest of the depositors, shareholders or the company itself or to help the company to be out of the woods. In times of normal functioning such occasions do not arise except for routine inspections etc. with a view to see that things are moved smoothly in keeping with fiscal policies in general.

29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or commercial activity, maybe banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, such which do have impact on the economy of the country in general. But such activities cannot be classified as one falling in the category of discharging duties or functions of a public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of *Ajay Hasia*. Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument, even if it may be assumed that one or the other test as provided in the case of *Ajay Hasia* may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made

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in the case of *Pradeep Kumar Biswas* quoted earlier would also be relevant."

In distinguishing the decisions in **Andi Mukta Sadguru S.M.V.S.S.J.M.S. Trust** (supra) and **U.P. State Cooperative Land Development Bank Ltd. vs. Chandra Bhan Dubey**[104], the Court held as follows:

"32. Merely because Reserve Bank of India lays the banking policy in the interest of the banking system or in the interest of monetary stability or sound economic growth having due regard to the interests of the depositors etc. as provided under Section 5(*c*)(*a*) of the Banking Regulation Act does not mean that the private companies carrying on the business or commercial activity of banking, discharge any public function or public duty. These are all regulatory measures applicable to those carrying on commercial activity in banking and these companies are to act according to these provisions failing which certain consequences follow as indicated in the Act itself. As to the provision regarding acquisition of a banking company by the Government, it may be pointed out that any private property can be acquired by the Government in public interest. It is now a judicially accepted norm that private interest has to give way to the public interest. If a private property is acquired in public interest it does not mean that the party whose property is acquired is performing or discharging any function or duty of public character though it would be so for the acquiring authority.

33. For the discussion held above, in our view, a private company carrying on banking business as a scheduled bank, cannot be termed as an institution or a company carrying on any statutory or public duty. A private body or a person may be amenable to writ jurisdiction only where it may become necessary to

[104] (1999) 1 SCC 741

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> compel such body or association to enforce any statutory obligations or such obligations of public nature casting positive obligation upon it. We don't find such conditions are fulfilled in respect of a private company carrying on a commercial activity of banking. Merely regulatory provisions to ensure such activity carried on by private bodies work within a discipline, do not confer any such status upon the company nor put any such obligation upon it which may be enforced through issue of a writ under Article 226 of the Constitution. Present is a case of disciplinary action being taken against its employee by the appellant Bank. The respondent's service with the Bank stands terminated. The action of the Bank was challenged by the respondent by filing a writ petition under Article 226 of the Constitution of India. The respondent is not trying to enforce any statutory duty on the part of the Bank. That being the position, the appeal deserves to be allowed."

95. Needless to observe, this decision is extensively quoted for guidance on activities of banking companies, the extent of control that is exercised by RBI and the Central Government and when and whether, if at all, a writ petition would lie against a banking company at the instance of its employees aggrieved by any of its actions. We are, however, conscious that the Court was dealing with a private banking company without any history of the Government carrying on the same activity before.

96. The third in the series is the decision in **Virendra Kumar Srivastava vs. U.P. Rajya Karmachari Kalyan Nigam**[105]. The Supreme Court reiterated that in order to

[105] (2005) 1 SCC 149

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examine whether or not an authority is a "State" within the meaning of Article 12 of the Constitution, the court must carry out an in-depth examination of who has administrative, financial and functional control of such a company/corporation, and then assess whether the State in such a case is only a regulatory authority, or if it has deep and pervasive control over such a company/corporation, whether such company is receiving full financial support from the Government, and whether administrative control over it has been retained by the State and its authorities, and further, whether it is supervised, controlled and watched over by various departmental authorities of the State, even with respect to its day-to-day functioning. If it is so, then such company/corporation can be held to be an instrumentality of the State under Article 12 of the Constitution and, therefore, will be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution.

97. Fourth in line is the decision in **Binny Ltd. vs. V. Sadasivan**[106]. The appellant invoked clause (8) of an agreement dated 12th March 1991, entered into by the respondents with the appellant, and terminated the services of the respondents. Clause (8) of the agreement gave the right to the appellant to terminate the services without assigning any reason by giving a month's notice or salary in lieu thereof. The respondents filed a writ petition for a

[106] (2005) 6 SCC 657

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declaration that clause (8) of the agreement read with the order of termination dated 31st July 1996 issued by the appellant was void and illegal and violative of section 23 of the Contract Act, 1872. The respondents had also contended that the agreement entered into by the respondents with the appellant was violative of Article 21 of the Constitution and the closure of the mill was against sections 25-F and 25-N of the Industrial Disputes Act, 1947. They sought for a direction to reinstate them in service with continuity of service and all consequential benefits. The appellant contended that the writ petition was not maintainable as the appellant was a private body; hence, the question of granting the declaration sought would not arise. According to the appellant, it was neither a "public authority" nor did its action involve a public law element, for which remedy of writ of mandamus was available. A Division Bench of the Madras High Court held that clause (8) of the agreement entered into between the respondents and the appellant was void and unenforceable against the respondents, being violative of section 23 of the Contract Act, 1872. Placing reliance on **Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly**[107], the High Court ultimately held that in proceedings under Article 226, the employees would not be entitled to the relief of reinstatement and back wages, but the Court granted only a declaratory relief to the effect that the termination order

[107] (1986) 3 SCC 156

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was illegal and the respondents had to work out an appropriate remedy before the appropriate forum. It is in such factual background that the Court, after considering authorities, both textual and judicial, proceeded to observe as follows:

> "11. Judicial review is designed to prevent the cases of abuse of power and neglect of duty by public authorities. However, under our Constitution, Article 226 is couched in such a way that a writ of mandamus could be issued even against a private authority. However, such private authority must be discharging a public function and the decision sought to be corrected or enforced must be in discharge of a public function. The role of the State expanded enormously and attempts have been made to create various agencies to perform the governmental functions. Several corporations and companies have also been formed by the Government to run industries and to carry on trading activities. These have come to be known as public sector undertakings. However, in the interpretation given to Article 12 of the Constitution, this Court took the view that many of these companies and corporations could come within the sweep of Article 12 of the Constitution. At the same time, there are private bodies also which may be discharging public functions. It is difficult to draw a line between public functions and private functions when they are being discharged by a purely private authority. A body is performing a 'public function' when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest. ***
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> ***

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> 29. Thus, it can be seen that a writ of mandamus or the remedy under Article 226 is pre-eminently a public law remedy and is not generally available as a remedy against private wrongs. It is used for enforcement of various rights of the public or to compel public/statutory authorities to discharge their duties and to act within their bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties. This writ is admirably equipped to serve as a judicial control over administrative actions. This writ could also be issued against any private body or person, specially in view of the words used in Article 226 of the Constitution. However, the scope of mandamus is limited to enforcement of public duty. The scope of mandamus is determined by the nature of the duty to be enforced, rather than the identity of the authority against whom it is sought. If the private body is discharging a public function and the denial of any right is in connection with the public duty imposed on such body, the public law remedy can be enforced. The duty cast on the public body may be either statutory or otherwise and the source of such power is immaterial, but, nevertheless, there must be the public law element in such action. ***"

98. The other decision is **Lt. Governor of Delhi v. V.K. Sodhi**[108] wherein a similar test was applied, and it was held that once finances are made available to the company, and the administration of such finances is left to that company, and there is no further governmental control or interference with respect to the same, such company/corporation or society cannot be held to be "State", or a State instrumentality within the meaning of Article 12 of the Constitution.

[108] (2007) 15 SCC 136

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99. Balmer Lawrie & Co. Limited (supra), as noted above, has inspired the contesting parties to buttress their respective contentions. We reproduce certain important passages from the said decision, hereunder:

> "9. We have considered the rival submissions made by the learned counsel for the parties and perused the record. There is sufficient material on record, and the memorandum and articles of association of the appellant Company make it abundantly clear, that the same is a government company and is a subsidiary of IBP, which is also a government company. The shareholding of the appellant Company has been referred to hereinabove, and more than 61.8% shares are held by IBP, a government company. However, the question for consideration before us is, whether in light of the aforementioned facts and circumstances, the appellant Company is, in fact, 'State' within the meaning of Article 12 of the Constitution.
>
> 10. The said issue has been considered by various larger Benches, and it has been held that in order to meet the requirements of law with respect to being 'State', the company concerned must be under the deep and pervasive control of the Government.
>
> 11. The dictionary meaning of '*pervasive*' has been provided hereunder:
>
> > 'It means that which pervades/tends to pervade in such a way, so as to be, or become, prevalent or dominant.'
> >
> > ***
> >
> > 'Extensive or far-reaching, spreading through every part of something'."

Thereafter, the Court proceeded to notice the precedents in the field and concluded as under:

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"20. Every governmental function need not be sovereign. State activities are multifarious. Therefore, a scheme or a project, sponsoring trading activities may well be among the State's essential functions, which contribute towards its welfare activities aimed at the benefit of its subjects, and such activities can also be undertaken by private persons, corporates and companies. Thus, considering the wide ramifications, sovereign functions should be restricted to those functions, which are primarily inalienable, and which can be performed by the State alone. Such functions may include legislative functions, the administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon, etc. Therefore, mere dealing in a subject by the State, or the monopoly of the State in a particular field, would not render an enterprise sovereign in nature. ***

21. A public authority is a body which has public or statutory duties to perform, and which performs such duties and carries out its transactions for the benefit of the public, and not for private profit. Article 298 of the Constitution provides that the executive power of the Union and the State extends to the carrying on of any business or trade. A public authority is not restricted to the Government and the legislature alone, and it includes within its ambit, various other instrumentalities of State action. The law may bestow upon such organisation the power of eminent domain. The State in this context, may be granted tax exemption, or given monopolistic status for certain purposes. The 'State' being an abstract entity, can only act through an instrumentality or an agency of natural or juridical persons. The concept of an instrumentality or agency of the Government is not limited to a corporation created by a statute, but is equally applicable to a company, or to a society. In a given case, the court must decide, whether such a company or society is an instrumentality or agency of the Government, so as to determine whether the same falls within the meaning of the expression 'authority',

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as mentioned in Article 12 of the Constitution, upon consideration of all relevant factors.

22. In light of the aforementioned discussion, it is evident that it is rather difficult to provide an exhaustive definition of the term 'authorities', which would fall within the ambit of Article 12 of the Constitution. This is precisely why only an inclusive definition is possible. It is in order to keep pace with the broad approach adopted with respect to the doctrine of equality enshrined in Articles 14 and 16 of the Constitution, that whenever possible courts have tried to curb the arbitrary exercise of power against individuals by centres of power, and therefore, there has been a corresponding expansion of the judicial definition of the term 'State', as mentioned in Article 12 of the Constitution.

23. In light of the changing socio-economic policies of this country, and the variety of methods by which government functions are usually performed, the court must examine, whether an inference can be drawn to the effect that such an authority is in fact an instrumentality of the State under Article 12 of the Constitution. It may not be easy for the court, in such a case, to determine which duties form a part of private action, and which form a part of State action, for the reason that the conduct of the private authority may have become so entwined with governmental policies, or so impregnated with governmental character, so as to become subject to the constitutional limitations that are placed upon State action. Therefore, the court must determine whether the aggregate of all relevant factors once considered, would compel a conclusion as regards the body being bestowed with State responsibilities.

24. When we discuss 'pervasive control', the term 'control' is taken to mean check, restraint or influence. Control is intended to regulate, and to hold in check, or to restrain from action. The word 'regulate', would mean to control or to adjust by rule, or to subject to governing principles.

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28. In order to determine whether an authority is amenable to writ jurisdiction except in the case of habeas corpus or quo warranto, it must be examined, whether the company/corporation is an instrumentality or an agency of the State, and if the same carries on business for the benefit of the public; whether the entire share capital of the company is held by the Government; whether its administration is in the hands of a Board of Directors appointed by the Government; and even if the Board of Directors has been appointed by the Government, whether it is completely free from governmental control in the discharge of its functions; whether the company enjoys monopoly status; and whether there exists within the company, deep and pervasive State control. The other factors that may be considered are whether the functions carried out by the company/corporation are closely related to governmental functions, or whether a department of the Government has been transferred to the company/corporation, and the question in each case, would be whether in light of the cumulative facts as established, the company is financially, functionally and administratively under the control of the Government. In the event that the Government provides financial support to a company, but does not retain any control/watch over how it is spent, then the same would not fall within the ambit of exercising deep and pervasive control. Such control must be particular to the body in question, and not general in nature. It must also be deep and pervasive. The control should not, therefore, be merely regulatory."

100. Next in the series is the decision in **Jatya Pal Singh** (supra). As noted above, it arose out of an order dated 8th September 2009 of a Division Bench of this Court dismissing a writ petition filed by the appellant. No separate

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reason was assigned by the Division Bench except observing that the reasons assigned by it while dismissing an earlier writ petition involving common questions of fact and law by its order dated 7th September 2009 would apply to the writ petition of the appellant (Jatya Pal Singh) before the Supreme Court. From the report, we have found that the other petitioner too was before the Supreme Court with an independent appeal, titled M.P. Singh vs. Union of India & ors. The decision also appears to have dealt with civil appeals arising from orders of dismissal of writ petitions passed by the Delhi High Court.

101. The appellants were employees of VSNL. Their services were terminated by VSNL. The writ petitions were dismissed on the ground that VSNL was not amenable to the writ jurisdiction. For the reasons assigned in the common judgment, the appeals stood dismissed.

102. It was contended on behalf of the appellants that VSNL cannot be said to be not amenable to the writ jurisdiction in view of the shareholding pattern which revealed that Union of India, holding 26.97% shares, was the single largest shareholder in VSNL and other Government companies held 17.35% shares. Furthermore, VSNL was under the complete control of the Telecom Regulatory Authority of India (TRAI) Act, 1997 and the Telegraph Act, 1948. Therefore, writ petitions would lie in cases where the services of the employees were terminated in breach of the rules governing the service conditions of

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the employees. It was further the case of the appellants that Panatone Finvest Ltd. having stepped into the shoes of the erstwhile shareholder is bound by the commitments and obligations, rights and liabilities arising from the sale/purchase of shares.

103. The Court noted that after disinvestment of VSNL in 2002, the name of VSNL being a TATA group company was changed to Tata Communications Ltd. (TCL). However, the orders of termination impugned in the writ petitions were issued before such change took place. After noting **Pradeep Kumar Biswas** (supra), the Court examined whether TCL was performing public functions and answered the question in the negative. Having considered **Binny Ltd.** (supra), the Court held that:

> "52. These observations make it abundantly clear that in order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so.
>
> 53. In the present case, as noticed earlier, all telecom operators are providing commercial service for commercial considerations. Such an activity in substance is no different from the activities of a bookshop selling books. It would be no different from any other amenity which facilitates the dissemination of information or data through any medium. We are unable to appreciate the submission of the learned counsel for the appellants that the activities of TCL are in aid of enforcing the fundamental rights under Article 19(1)(*a*) of the Constitution. The recipients of the service of the telecom service voluntarily enter into a

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> commercial agreement for receipt and transmission of information.
>
> 54. The function performed by VSNL/TCL cannot be put on the same pedestal as the function performed by private institution in imparting education to children. It has been repeatedly held by this Court that private education service is in the nature of sovereign function which is required to be performed by the Union of India. Right to education is a fundamental right for children up to the age of 14 as provided in Article 21-A. Therefore, reliance placed by the learned counsel for the appellants on the judgment of this Court in *Andi Mukta* would be of no avail. In any event, in the aforesaid case, this Court was concerned with the non-payment of salary to the teachers by Andi Mukta Trust. In those circumstances, it was held that the Trust is duty-bound to make the payment and, therefore, a writ in the nature of mandamus was issued."

104. The Court, therefore, held that a writ petition would not be maintainable against VSNL, a *fortiori*, TCL.

OUR DECISION ON MAINTAINABILITY

105. Having noted the law declared in the decisions referred to above, we move on to consider the submissions advanced on behalf of the parties in the light of the innumerable documents that have been tendered across the bar for and against maintainability of the writ petition.

106. The decision of the Supreme Court in **K.S. Ramamurthy Reddiar** (supra) laid down that Article 12 of the Constitution defining "State" for the purposes of Part III of the Constitution, would include –

(*i*) the Government and the Parliament of India,

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(*ii*) the Government and the Legislature of each State,
(*iii*) all local or other authorities within the territory of India, and
(*iv*) all local or other authorities under the control of the Government of India.

107. The concept of an instrumentality or agency of the Government being comprehended within the meaning of 'other authorities' and, therefore, 'State' within the meaning of Article 12, was the sequitur of progressive judicial thinking of Justice K.K. Mathew, carried forward by Justice P.N. Bhagwati, as reflected in the decisions relied on by Mr. Garg. Since then, the net of Article 12 stands expanded to also include within its range agencies and instrumentalities performing State functions or entrusted with State action. For the present purpose, we are only concerned whether IDBI Ltd. is an Article 12 authority under the control of the Government of India.

108. The attempt of Mr. Garg plainly has been to persuade us hold that IDBI Ltd. is an instrumentality of the Government of India, which has been functioning under a corporate veil.

109. The object and purpose of the IDBI Act is clear from its preamble. It is stated in the preamble that the IDBI Act is an Act to establish the Development Bank as the principal financial institution for co-ordinating, in conformity with national priorities, the working of institutions engaged in financing, promoting or developing industry, for assisting

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the development of such institutions for providing credit and other facilities for the development of industry and for matters connected therewith and further to amend certain enactments.

110. The IDBI Repeal Act was enacted by the Parliament to provide for transfer and vesting of undertaking of the Development Bank to and in the company to be formed and registered as a company under the Companies Act, 1956 to carry on banking business and for matters connected therewith or incidental thereto and also to repeal the IDBI Act. Section 3 of the IDBI Repeal Act provides that on and from the date the Central Government by notification appoints, the undertaking of the Development Bank shall be transferred to, and vest in, the company to be formed and registered under the Companies Act, 1956. It is not in dispute that from 1st October 2004, the undertaking of the Development Bank stood transferred to, and vested in, the company (IDBI Ltd.) in terms of section 3(1) of the IDB Repeal Act. Thus, from 1st October 2004, the Development Bank from a body corporate changed form and became IDBI Ltd., a Government company as defined in section 617 of the Companies Act, 1956.

111. While deciding whether IDBI Ltd. is an instrumentality and thus 'State' within the meaning of Article 12 of the Constitution, it needs examination whether an agency or instrumentality of the State has assumed the garb of a Government company as defined in section 617 of the

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Companies Act, 1956. As **Brojo Nath Ganguly** (supra) signals, for the purpose of Article 12 one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the State.

112. It can be gathered from what Mr. Garg has argued before us that the Central Government's share in IDBI Ltd. increased from 52.67% to 76.50% between 2007 and 2014, and infused more funds to increase its shareholding to 85.96% in the year 2018. Though there are no pleadings to this effect, we would assume the figures cited by Mr. Garg to be correct.

113. We need to now focus, based on the above facts and figures, whether IDBI Ltd. satisfies the tests for being considered as a 'State' within the meaning of Article 12 in the light of the authorities noticed above. Reminding ourselves that **Pradeep Kumar Biswas** (supra) has observed that the tests formulated in **Ajay Hasia** (supra) are not a rigid set of principles and, hence, a body falling within any one of them, *ex hypothesi*, may not be considered to be a 'State', and also that the question in each case would be whether in the light of the cumulative facts, as established, the body is functionally, financially and administratively dominated by or under the control of the Government, we propose to give to the Association considerable leeway and embark on our task bearing in mind the broad limits set by **Ajay Hasia** (supra).

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114. For IDBI Ltd. to be considered as an 'other' authority and, hence, a 'State', the functional, financial and administrative dominance or control of the Central Government over IDBI Ltd., as on date of institution of the Association's writ petition would, therefore, be relevant. While countering the objection of Mr. Talsania that as on date the writ petition was heard a writ cannot be issued to IDBI Ltd. because of the change we have noticed above, Mr. Garg's contention has been that whatever existed on the date of institution of the writ petition ought to be borne in mind while considering whether relief should follow or not. If we are to follow **Rajahmundry Electric Supply Corporation Ltd.** (supra), relied on by Mr. Garg, "the validity of a petition must be judged on the facts as they were at the time of its presentation". If we accept such contention of Mr. Garg, we have no hesitation to observe that there is no material on record in the writ petition when it was instituted on 6th August 2012 to persuade us hold that IDBI Ltd. was a "State" within the meaning of Article 12. However, we do not propose to confine our consideration to the materials annexed to the writ petition of the Association but consider whatever has been placed on record through the subsequent compilations.

115. Let us begin with the 'functional' test. IDBI Ltd. is in the business of banking. The dicta in **Som Prakash Rekhi** (supra) is that the functional character of the body must be Governmental in essence. Is IDBI Ltd. carrying on business

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for the benefit of the public? In other words, for whose benefit is IDBI Ltd. into banking business? Here, we place on record that for want of relevant facts and figures, we have not been able to ascertain as to how the profits earned by IDBI ltd. are shared.

116. The functional control test requires us to ascertain the fact whether discharge of functions by IDBI Ltd. is of public importance and closely related to Governmental functions.

117. From the documents on record, we have found that IDBI was a Listed Entity constituted under the IDBI Act, as a Development Financial Institution (hereafter "DFI", for short) and came into being as on 1st July, 1964, vide Govt. notification dated 22nd June, 1964. It was regarded as a Public Financial Institution in terms of the provisions of section 4A of the Companies Act, 1956. It continued to serve as a DFI for 40 years till the year 2004. After that it was transformed into a bank. To transform it into a bank, the IDB Repeal Act was passed repealing the IDBI Act. In terms of the provisions of the IDB Repeal Act, a new company under the name of IDBI Ltd. was incorporated as a 'Banking Company' under the Companies Act, 1956 on 27th September, 2004. IDBI, which was a Public Financial Institution, thus ceased to exist. Thereafter, the undertaking of IDBI was transferred to and vested in the banking company with effect from 1st October, 2004. Later on, the name of the bank was changed to IDBI Bank Ltd. with effect from 7th May, 2008, upon the issue of a fresh

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Certificate of Incorporation by the Registrar of Companies, Maharashtra. In 2016, the Government of India decided to reduce its stake in IDBI Ltd. Taking note of this, LICI, after taking approval of the Insurance Regulatory and Development Authority of India (IRDAI) and other approvals, acquired 51% controlling stake in IDBI Ltd. Consequently, IDBI Ltd. was re-categorized as a Private Sector Bank, with retrospective effect from 21st January, 2019. As on 31st March, 2019, the GoI shareholding was 47.11%, the shareholding of the promoter (LICI) was 51.00% and shareholding of the public was 1.89%. Post QIP of December, 2020, the GoI shareholding in IDBI Ltd. is at 45.48%, LICI at 49.24% and the non-promoter (Public) shareholding has increased to 5.29%.

118. It is here that the observations made by the Supreme Court in **Federal Bank** (supra), which we have quoted in extenso, may have relevance. IDBI Ltd. is into the business of banking and engaged in commercial activities. Anyone in banking business is subject to the regulatory control of RBI and, therefore, IDBI Ltd. has to abide by the regulatory measures introduced by RBI from time to time. In the due discharge of its functions as a banking company, IDBI Ltd. does not also enjoy any monopoly status which could provide an indicium for holding it to be "State" within the meaning of Article 12.

119. Also, IDBI Ltd. neither performs any function which is similar to the one performable by the State in its sovereign

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capacity nor is its functions fundamental to the life of the people. In the discharge of its functions, IDBI Ltd. does not owe any public duty *qua* the members of the Association. Public duty, if any, IDBI Ltd. owes to its constituents and if any statutory breach were to occur and brought to Court, a writ could lie against it. But, IDBI Ltd., in its role as an employer has to honour the contractual relationship of employer-employee and has no statutory duty towards its employees. Its functions are not of public importance. It is not as if IDBI Ltd. is discharging functions or doing business as the proxy of the State by wearing a corporate mask or that it has an element of ability to affect legal relations by virtue of power vested in it by law, both of which are essential as per **Som Prakash Rekhi** (supra). IDBI Ltd., in our view, does not therefore satisfy the functional test.

120. Next, we turn to financial dominance or control. For ascertaining financial dominance or control, the first test requires an inquiry as to whether the entire share capital of IDBI Ltd. was held by the Central Government till at least 2018 when LICI became the major shareholder; in other words, whether financial assistance by the Central Government to IDBI Ltd. was so much as to meet its entire expenditure.

121. In 2018, the shareholding of the Central Government was roughly 85%. **Som Prakash Rekhi** (supra) did lay down that one of the preponderant considerations for pronouncing an entity as 'State' agency or instrumentality is

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"the financial resources of the State being the chief funding source". Viewed from that angle, indeed it was so in 2018. But we notice a change having been brought about by **Ajay Hasia** (supra). The said decision, which now has the imprimatur of the Constitution Bench of larger strength in **Pradeep Kumar Biswas** (supra), appears to have made a slight deviation and laid down as a test that *"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 agency or instrumentality of the Government"*. Obviously, the entire share capital in IDBI Ltd. even in 2018 was not held by the Central Government. In 2014, i.e., a couple of years after the Association instituted its writ petition, it was 76.50%. We are conscious that a judgment, even if that be one rendered by the Supreme Court, is not to be read as a statute. However, what is of relevance is the law that has developed by a series of decisions in the field and it seems to be an accepted legal position now that where the financial assistance from the State is so much as to meet almost (emphasis ours) the entire expenditure of the entity or its share capital is completely (emphasis ours) held by the Government, it would afford some indication of the body being impregnated with Governmental character. Therefore, although the entire share capital in IDBI Ltd. was never held by the Central Government, the financial assistance was also not to such an extent as 'almost' which would

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justify a conclusion that IDBI Ltd. does satisfy this test.

122. Nonetheless, while the extent of funding or financial assistance by the Government could be an indicative indicium, we are minded to hold that that by itself is not conclusive. The control exercised by the Government over such funding or financial assistance is perhaps the more relevant factor in deciding the status of a body like IDBI Ltd. Is IDBI Ltd. subject to the same limitations as the Government in utilizing such funds that it receives from the Government? Is the control, if any, exercised by the Government merely a regulatory control or a deep and pervasive control in the sense that at every step of expending such funds, approval of the Government has to be obtained? Whether the accounts of IDBI Ltd. are required to be audited by either the Comptroller and Auditor General of India (hereafter "CAG", for short) or by any other person appointed in this behalf and thereupon, whether the audit report has to be laid before both Houses of Parliament? These are questions of relevance, which can only be decided based on examination of materials which are relevant.

123. Based on the aforesaid parameters, we looked into the compilations relied on by the Association but regret our inability to locate any material of worth which would throw light on these aspects. Annual Reports of the Government of India in the Ministry of Finance could have been placed in support of Mr. Garg's contention but were not placed. The

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'Press Release' which was relied on does show that the Central Government infused funds but that has since been shown by Mr. Talsania to be a one-off measure. The accounts of IDBI Ltd., Mr. Talsania answered replying to our query, is neither audited by the CAG nor is the audit report required to be laid before the Parliament.

124. It has also been shown to us by Mr. Talsania under what circumstances financial assistance was rendered by the Central Government to IDBI Ltd., i.e., to help IDBI Ltd. to wriggle out of the PCA framework of RBI.

125. We are, thus, not persuaded to accept that financial control by the Central Government over IDBI Ltd. is such that the financial control test, as laid down in paragraph 40 of **Pradeep Kumar Biswas** (supra), stands satisfied.

126. The final test relates to finding out administrative control, i.e., whether deep and pervasive control over IDBI Ltd. by the Central Government is present. In terms of **Som Prakash Rekhi** (supra), the primary control over the body residing in the Government and the prior history of the activity carried on by the body having been carried on by the Government are essential tests.

127. No doubt, the Central Government did have a significant part in formation of the Board of Directors of IDBI Ltd. It is also true that in the matter of making appointments on posts, IDBI Ltd. has been adhering to the reservation policy, unlike a private entity which is under no

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such compulsion. It is equally true, as has been shown by Mr. Garg that IDBI Ltd., as if it were a public authority, has been disseminating information to the general public in terms of the mandate of the RTI Act.

128. The first factor would not, however, assist us in holding that the Central Government had deep and pervasive control over IDBI Ltd. Notwithstanding the Central Government playing a significant part in formation of the Board of Directors of IDBI Ltd. in terms of the Articles of Association, it has not been shown that in exercising administrative control over IDBI Ltd., the activities of IDBI Ltd. are supervised, controlled and watched over by the various departments of the Central Government with respect to its day to day functions. Regard being had to the decisions in **Virendra Kumar Srivastava** (supra) and **Balmer Lawrie & Co. Ltd.** (supra), it is difficult to record a conclusion of overwhelming administrative control of IDBI Ltd. by the Central Government.

129. Insofar as adherence to reservation policy while making appointments or disseminating information under the RTI Act are concerned, we record that the same are laudable measures taken by the Board of Directors of IDBI Ltd., but do not carry forward the case of the Association for demonstrating that IDBI Ltd. is administratively controlled or dominated by the Central Government.

130. Administrative dominance or control by the Central

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Government over IDBI Ltd., we hold, is not such for recording a finding that the test laid down in this behalf in **Pradeep Kumar Biswas** (supra) stands satisfied.

131. We have considered the decision in **Mysore Paper Mills Ltd.** (supra). For the reasons that we have discussed above, the ratio of such decision has no application here.

132. The principles enunciated by the Supreme Court, in their applicability to the facts found, does not persuade us to hold that IDBI Ltd. was/is "State" within the meaning of Article 12.

133. Notwithstanding our observations as above, we shall now proceed to consider the issue of maintainability of the writ petition of the Association assuming that IDBI Ltd. is "State" within the meaning of Article 12. In this connection, we have to bear in mind that Mr. Garg has not claimed that IDBI Ltd. discharges a public function.

134. It is essential to bear in mind that every service, in the Indian context, has its origin in a contract. In case of public service, after acceptance of the offer of appointment on a substantive post (as distinguished from appointment on ad hoc basis or for any particular project or on contract for a specified period), the appointees acquire a status and their relationships with the employers cease to remain purely contractual. One finds the dominance of rules in public service for service security as well as to ensure uniformity and certainty during the period the relationship subsists,

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and even thereafter for release of retiral benefits. The terms and conditions of service of the appointees and their relationship with their employers are generally governed by provisions of law. Such provisions could either be statutes framed under the Constitution or delegated legislation or even administrative instructions having the force of law, in the absence of statutory provisions. For those in civil service or civil post holders, Chapter I of Part XIV of the Constitution itself affords additional protection. That apart, the entire set of appointees entitled to statutory protection from arbitrary treatment while in service would include employees under corporations directly incorporated by statutes, whose terms and conditions of service are governed by rules framed under the enactment creating the corporations. Insofar as employees of agencies or instrumentalities of the State are concerned, their service conditions would have to be governed either by the contract of service or policy decisions taken by such agencies or instrumentalities. However, for persons in private employment, the terms and conditions of service would be governed by the terms of the contract of service or by standing orders on employment, to whomsoever applicable.

135. There can be no dispute, in view of a plethora of Civil Services Pension Rules framed by the Central Government as well as the State Governments under the proviso to Article 309 of the Constitution for its officers/employees, that pension has long been recognized as a condition of

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service under the State although it is payable periodically after cesser of relationship as deferred payment of compensation but upon satisfactory completion of qualifying service and subject to the further consideration that the officer/employee concerned is not otherwise disentitled to the same. However, the right to pension having accrued under such Pension Rules, right to pension can be claimed by the pensioners as a statutory right. If indeed an occasion arises for depriving a pensioner of pension by reason of either deduction or withholding or forfeiture, the same can only be effected by the pension sanctioning authority in accordance with the rules framed in that behalf and not arbitrarily. Once sanctioned and paid, pension assumes the character of a right to property guaranteed by Article 300A of the Constitution for pensioners and without the authority of law, such a right can never be abrogated.

136. Let us now ascertain from the writ petition what has the Association alleged in regard to invasion and/or infringement of any Fundamental Right of its member officers. This is relevant because the writ petition would be maintainable against IDBI Ltd. only if invasion and/or infringement of any Fundamental Right were established. Paragraph 28 of the writ petition and ground (a) under paragraph 29 reveal the Association's impression of the impugned circular being illegal and in violation of the Fundamental Rights of the officers of IDBI Ltd. who were appointed between 2008 and 2012. In ground (z), it has

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been urged that enforcement of the impugned circular with retrospective effect is violative of rights guaranteed under Articles 19(1) and 31(1) of the Constitution. A repetition of the same ground, in somewhat different language, is found in ground (af). These are all that we have found in respect of invasion and/or infringement of any Fundamental Right of the member officers of the Association.

137. The Constitution, with as many as more than a century of amendments, does not have any article numbered 31(1). It could be a typing error in the writ petition but such error has crept in twice. Nevertheless, we shall assume that the Association meant Article 21 and not 31.

138. We do not see reason to hold, on facts and in the circumstances, that the dispute relating to pension could partake the character of violation of a Fundamental Right. Even if there were rules which continued till LICI took over, they did not have any statutory force and the status of such rules would be contract between the employer and the employee. The claim of violation of Fundamental Right is not well-founded and hence we overrule the same.

139. On the conspectus of the above, the conclusion seems to be irresistible that even if IDBI Ltd. were considered as an Article 12 authority, the writ petition of the Association does not involve any question arising out of alleged breach of Fundamental Right and therefore, the writ petition is not

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maintainable.

140. The final contention on maintainability arising out of the intervening event between the institution of the writ petition by the Association and on the date the same was finally heard need not detain us for long in view of the conclusions that we have recorded above. However, to keep the record straight, we see such intervening event as sort of the last nail in the Association's coffin. Minutes before, we have delivered the judgment in Writ Petition No. 1770 of 2011 (**Mr. R. S. Madireddy s/o. Mr. Kotyswara Rao Madireddy and Anr. Vs. The Union of India and Ors.**) and connected matters. The reasons assigned by us in the said judgment, in particular paragraph 59, for holding the writ petitions not maintainable against Air India Ltd. would apply with equal force to the case of the Association. We quote paragraph 59 hereinbelow:

> "59. Our discussion should start with the alert that writ remedy is discretionary. It is elementary that a writ petition under Article 226 of the Constitution may be entertained by a high court if an entitlement in law, which is normally referred to as a legal right, is shown to exist and a breach thereof is alleged. The right to relief before a writ court, as claimed, necessarily casts a duty on the party aggrieved who approaches the court to satisfy it that the entitlement is capable of being judicially enforced against the party complained of and that the latter answers the identity of an 'authority' or a 'person' to whom the writ or order or direction can legitimately be issued. In other words, the party complained of must be amenable to the writ jurisdiction of the high court. Therefore, generally speaking, as on date of admission hearing of a writ

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petition, the writ court is required to form a *prima facie* satisfaction on both the above counts. If either a legal right has not been infringed or the party complained of is not amenable to the court's writ jurisdiction, obviously the writ petition cannot be entertained. If, however, the court is *prima facie* satisfied, the court may in the exercise of its discretion admit the writ petition and post it for final hearing. After the pleadings are exchanged, and once the court arrives at a conclusion that a legal entitlement exists and such entitlement has been breached, together with the satisfaction that a writ would lie against the party complained of, an appropriate writ or order or direction can be issued. Thus, satisfaction as regards the breach of a legal entitlement apart, what is important in this context is that such breach must have been at the instance of the party complained of to whom a writ or order or direction can legitimately be issued. Not only, therefore, the party complained of should be amenable to the writ jurisdiction of the high court on the date of institution of the writ petition, it must also be so when the writ petition is finally heard and decided. It is thus axiomatic that only upon a double check (first at the time of admission of the writ petition, and then again at the time of final hearing thereof that the respondent against whom the complaint of commission of breach of a legal right of the petitioner is made is amenable to the writ jurisdiction) would the court proceed to decide the contentious issues. If not so amenable, the question of deciding the issues on merits may not arise. What follows from the aforesaid discussion is that the writ court when approached must not only have jurisdiction to issue a writ or order or direction to the party against whom the complaint of breach of a legal right has been made at the inception of receiving the writ petition but such jurisdiction it must retain, without impairment, till the jurisdiction to issue the writ to such party is actually discharged."

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141. IDBI Ltd. as on date the writ petition of the Association was finally heard, lost its character as a Government company. We also find no reason to accept the contention of Mr. Garg that pursuant to acquisition by LICI, by virtue of the deeming fiction under section 139(7) of the Companies Act, 2013, IDBI Ltd. would retain its character as a Government company. On the plain language of sub-section (7), such a construction as urged by Mr. Garg cannot be made. This is apart from the fact that the CAG does not either audit the accounts of IDBI Ltd. nor are its accounts placed before the Parliament.

142. For the reasons aforesaid, the writ petition instituted by the Association (Writ Petition No. 2833 of 2012) stands dismissed as not maintainable.

OUR DECISION ON MAINTAINABILITY OF THE OTHER WRIT PETITIONS (WP NO. 214/2016 & WP NO. 12607/2015):

143. Mr. Rao, learned advocate for the petitioners did not advance oral arguments but sought for leave to file written note of arguments.

144. The written note arguments filed by Mr. Rao has been perused. More or less the same points, as urged by Mr. Garg to support maintainability of the Association's writ petition, are found to have been urged on behalf of the Organization and the petitioning employees.

145. The petitioners say that when the writ petitions were instituted, they were under the impression that IDBI Ltd.

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was a 'State" within the meaning of Article 12 of the Constitution and hence did not make any averment in that regard. However, in early 2020, IDBI Ltd. filed it reply affidavit taking objection to the maintainability of the writ petitions. Due to the out break of the pandemic, the petitioners could not file their rejoinder affidavits. However, documents relevant for deciding the issue of maintainability have been annexed to the written note of arguments and the petitioners have prayed for consideration thereof.

146. Interestingly, IDBI Ltd. was never categorized as a 'public sector bank' but as 'other public sector bank' and after 2018, it is categorized as a 'private sector bank'. We are left to wonder why appropriate averments were not made in the writ petitions. No decision of any Court was brought to our notice which had held, by the time the writ petitions were instituted, that IDBI Ltd. was a "State" within the meaning of Article 12. For lack of appropriate averments, the writ petitions are liable to fail but we have decided against resorting to short cuts.

147. The only point requiring consideration raised by Mr. Rao, which was not raised by Mr. Garg, is that IDBI ltd. discharges public functions and it is constituted under the Banking Regulation Act, 1949; hence, IDBI Ltd. is 'State" within the meaning of Article 12 of the Constitution.

148. We find no merit in either of the two parts of this contention. Neither is IDBI Ltd. discharging public functions

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nor is it constituted under the Banking Regulation Act.

149. IDBI Ltd., as noticed above, is carrying on business in banking and is a banking company within the meaning of section 5(c) of the Banking Regulation Act. As a banking company and *qua* its role as an employer, IDBI Ltd. does not discharge any public function and rightly so, Mr. Garg did not advance such extreme contention.

150. We have not been apprised of any provision in the Banking Regulation Act which would support the contention that IDBI Ltd. is constituted under the Banking Regulation Act. On the other hand, it is clear that IDBI Ltd. was incorporated as a company under the Companies Act upon the IDBI Repeal Act becoming operative.

151. In **Sukhdev Singh** (supra), the Supreme Court had the occasion to consider the status of a company incorporated under the Companies Act. It was held there that:

> "*25.* … 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. It is not a statutory body because it is not created by the statute. It is a body created in accordance with the provisions of the statute."

152. In such view of the matter, we reject the contention of Mr. Rao.

153. For the reasons assigned by us to hold the writ petition of the Association to be not maintainable, we hold

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the writ petitions instituted by the Organization and the petitioning employees too as not maintainable. All the three writ petitions stand dismissed. No costs.

154. Since all the three writ petitions are dismissed on the ground of acceptance of the objection of Mr. Talsania to the maintainability thereof, we expressly record not to have examined the claims laid before us by the Association, the Organization and the petitioning employees on merits. It shall be open to the Association, the Organization and the petitioning employees to institute appropriate proceedings in accordance with law before the Civil Court, if so advised. The time spent in prosecuting these proceedings shall, however, be excluded for the purpose of computation of limitation to approach the Civil Court.

(M.S. KARNIK, J.) **(CHIEF JUSTICE)**

PRAVIN DASHARATH PANDIT
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