IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 23rd DAY OF SEPTEMBER 2021

PRESENT

THE HON'BLE Mr. JUSTICE ARAVIND KUMAR

AND

THE HON'BLE Mr. JUSTICE PRADEEP SINGH YERUR

WRIT APPEAL NO.4393 OF 2016 (S-DIS)

BETWEEN:

MS.JAYASHREE GURURAJ
D/O.H.S.GURURAJA RAO
AGED ABOUT 45 YEARS
R/AT 341, ADARSH PALM RETREAT
BELLANDUR OUTER RING ROAD
BENGALURU-560 095 ... APPELLANT

(BY SRI H.S.GURURAJ RAO, SENIOR COUNSEL A/W
SRI N.RAVINDRANATH KAMATH, ADVOCATE)

AND:

1. CISCO SYSTEMS (INDIA)
PRIVATE LIMITED
(A COMPANY INCORPORATED
UNDER THE COMPANIES ACT, 1956)
LOCATED AT CISCO SYSTEMS (INDIA)
PRIVATE LIMITED SEZ UNIT
CESSNA BUSINESS PARK
KADUBEESANAHALLI VILLAGE
VARTHUR HOBLI
SARJAPUR, MARATHALLI
OUTER RING ROAD
BENGALURU-560 103
KARNATAKA, INDIA
THROUGH ITS MANAGING DIRECTOR
CISCO SYSTEMS (INDAI) PVT. LTD.

2. MR.PARVESH SETHI
SENIOR VICE PRESIDENT
CISCO SYSTEMS, USA

CISCO SYSTEMS (INDIA)
PRIVATE LIMITED SEZ UNIT
CESSNA BUSINESS PARK
KADUBEESANAHALLI VILLAGE
VARTHUR HOBLI
SARJAPUR, MARATHALLI
OUTER RING ROAD
BENGALURU-560 103
KARNATAKA, INDIA

3. MR.SANJAY PAL
VICE PRESIDENT
CISCO SYSTEMS, USA
CISCO SYSTEMS (INDIA)
PRIVATE LIMITED SEZ UNIT
CESSNA BUSINESS PARK
KADUBEESANAHALLI VILLAGE
VARTHUR HOBLI
SARJAPUR, MARATHALLI
OUTER RING ROAD
BENGALURU-560 103
KARNATAKA, INDIA

4. MS.SEEMA NAIR, DIRECTOR, HR
CISCO SYSTEMS (INDIA)
PRIVATE LIMITED SEZ UNIT
CESSNA BUSINESS PARK
KADUBEESANAHALLI VILLAGE
VARTHUR HOBLI
SARJAPUR, MARATHALLI
OUTER RING ROAD
BENGALURU-560 103
KARNATAKA, INDIA ... RESPONDENTS

(BY SRI PRASHANTH V.G., ADVOCATE FOR R1, R3 & R4;
NOTICE TO R2 IS DISPENSED WITH
VIDE ORDER DATED 22.02.2017)

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THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE KARNATAKA HIGH COURTS ACT, 1961 PRAYING TO SET ASIDE THE ORDER DATED 06.10.2016 PASSED IN WP.NO.19726/2015 BY THE LEARNED SINGLE JUDGE OF THIS COURT AND ETC.

THIS WRIT APPEAL HAVING HEARD AND RESERVED FOR PRONOUNCEMENT OF JUDGMENT 13.09.2021 COMING

ON FOR PRONOUNCEMENT OF JUDGMENT THIS DAY, ***PRADEEP SINGH YERUR J.***, DELIVERED THE FOLLOWING:

J U D G M E N T

Appellant lays a challenge to the order of the learned Single Judge dated 06.10.2016 in WP.No.19726/2015 (S-DIS) whereby the writ petition came to be dismissed.

Brief facts of the case:

2. Appellant herein was petitioner before the learned Single Judge and had sought for the following reliefs:

> *"1. A writ of mandamus or any other appropriate writ or direction declaring the term 12(c)(ii) of the contract of employment as illegal, arbitrary, unreasonable, unconscionable, unfair, contrary to public policy and Section 23 of the Indian Contract Act and unconstitutional and consequently set aside the order of termination dated 24.04.2015 by restoring the petitioner's status as permanent employee holding the post of Senior Director in Cisco Systems (India) Pvt.Ltd. with all consequential benefits.*
>
> *2. Grant costs,*
>
> *3. Grant such other relief and reliefs as this Hon'ble Court deems fit, proper and*

necessary in the circumstances of the case and in the interests of justice and equity."

3. It is the case of appellant that she holds B.S. in Computer Engineering, M.S. in Computer Science and MBA from Ohio State University, USA. She worked in Senior position in USA, UK and India in reputed Companies like AT & T, Bell Lamps, Lucent Technologies, Hewlett Packard. Having regard to her meritorious service in the above said organization and excellent education qualifications in top Universities in USA, she was appointed as Senior Director, AS (Advance Services) at respondent No.1-Company (CISCO) vide offer letter/Contract of Employment dated 15.05.2012 vide Annexure-A.

4. During the period of her tenure at respondent No.1-Company, appellant had won several laurels, to state a few, she was rated "Outstanding" for both the years of her employment (financial year 2013 and 2014). She was nominated for 'Emerging Leaders' for CISCO leadership forum and identified as top talent in an independent Services Assessment published in

January, 2015. In this regard, appellant received accolades from Global Executive Talent HR Leader, Ms.Cassandra Frangos on November 22, 2013 recognising the leadership qualities demonstrated by the appellant in seven weeks development program for high potential Senior Directors across a wide array of functions in CISCO. In January, 2015, appellant was confirmed as being a top talent Senior Director among nearly 180 high potential global Senior Directors in CISCO services after an in-depth independent assistance.

5. The appellant's contribution to respondent No.1-Company was vital element of success of the Company which guided the team of CISCO to accomplish well targeted goals and achievements.

6. This being the state of affairs, the services of appellant came to be terminated by CISCO on 24.04.2015 vide Annexure-D.

7. Being aggrieved by the said termination, appellant filed the aforesaid writ petition seeking

aforesaid reliefs. After service of notice and appearance of respondent No.1-Company namely, CISCO and its Directors, a preliminary objection came to be raised by respondent No.1-Company regarding the maintainability of writ petition itself on the ground that the respondent is a private Company registered under the Companies Act, 1956 and that it would not come within the ambit Article 12 and would not be amenable to the writ jurisdiction under Article 226 of the Constitution of India. On this ground, CISCO sought for dismissal of the writ petition.

8. After hearing the parties, the main question that devolved before the learned Single Judge was, whether respondent No.1-Company namely, CISCO can be held to be discharging public functions which is otherwise to be discharged by the Government or its instrumentalities so that writ under Article 226 of the Constitution could be invoked against its action of termination of service of its officer. Having considered the rival submissions of the learned Senior Counsel, the learned Single Judge adverting to the points urged

therein with regard to the factual aspects and the questions of law did not find merit in the contentions raised by the appellant-petitioner and accordingly, rejected the same and held that first respondent-Company being a private Company involved in the business of economic activities cannot be said to be discharging any public or Governmental functions in carrying on its business. Hence, the writ petition challenging the order of termination of the appellant-petitioner who was working as a Senior Director is not maintainable. Reserving liberty to the appellant-petitioner to move the Civil Court to seek appropriate remedy under civil law dismissed the writ petition, which is the subject matter of this appeal.

Contentions of the learned Senior Counsel for the appellant:

9. It is vehemently contended by Sri H.S.Gururaja Rao, learned Senior Counsel appearing on behalf of Sri N.Ravindranath Kamath that–

(a) The learned Single Judge erred in holding that the writ petition is not maintainable ignoring the fact

that writ petition was heard on merits after having been admitted by issuing rule-*nisi* and posting for further hearing. Hence, the learned Single Judge committed an error in dismissing the writ petition on maintainability despite it having been admitted. Learned Senior Counsel relies on Rule 13 of the Writ Proceedings Rules, 1977 incorporated in the High Court of Karnataka to buttress his arguments that once the matter is admitted, it is the bounden duty of the learned Single Judge to have decided the matter on merits rather than dismissing the same on the ground of maintainability.

(b) Learned Senior Counsel contends that the impugned order denies justice to the deprived appellant of her livelihood resulting from the failure to exercise jurisdiction under Article 226 of the Constitution of India where there is violation of Articles 14 and 21 of the Constitution of India.

(c) It is further contended by the learned Senior Counsel that the learned Single Judge erred in deciding the maintainability of the petition without considering the binding judgment of the Apex Court in the case of

Charu Khurana v. Union of India reported in ***(2015)1 SCC 192*** wherein it was held that a writ petition for issue of writ of mandamus for private body not performing public function/Governmental functions/ public duties for declaring Clause 12(c)(ii) of the Contract of Employment invoked for terminating services as illegal and unconstitutional is maintainable which deprives livelihood guaranteed by Article 21 of the Constitution of India.

(d) Learned Senior Counsel further contends that the learned Single Judge has failed to consider the SEZ unit is created by the statute wherein respondent No.1-Company CISCO is carrying on economic activities and the same falls under the category of State within the definition of State as held by the Apex Court in the case of ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and Others*** reported in ***(2002)5 SCC 111.*** He further contends that the financial assistance flowing to the SEZ and exemption of tax granted under Sections 7, 26, 27 & 50 of the SEZ Act, 2005 leads to the conclusion that it falls under the State

as defined in Article 12 of the Constitution of India, more so, when the SEZ unit performs public functions and public utility services cannot enter into a contract opposed to law and public policy. Therefore, he contends that the respondent cannot be said to be not performing public functions and public utility services.

(e) Learned Senior Counsel further contends that Clause 12(c)(ii) of the Contract of Employment against public policy and termination of services of the employee could be examined under the writ jurisdiction where the Contract of Employment is contrary to Section 23 of the Contract Act for violating the public policy and Articles 12 and 21 of the Constitution of India. He relies on the judgment in the case of ***Central Inland Water Transport Ltd., and another etc. v. Brojonath Ganguly and another*** reported in ***(1986)3 SCC 156*** which was affirmed by the Constitution Bench of the Hon'ble Apex Court. The substance of arguments of the learned Senior Counsel on this point is that respondent No.1-Company having opted for SEZ unit in the SEZ area carved out by the Central Government

under the provision of SEZ Act, 2005 and the Rules made thereunder, and the approval granted to it is a statutory order made by the State Government. The economic activities specified in the LOA of the respondent consists of acquiring foreign exchange, generation of employment etc. which are admittedly Governmental functions, which makes SEZ unit performing Governmental functions and duties and clothes it with public character performing public functions and duties.

(f) Learned Senior Counsel further contends that the learned Single Judge has failed to appreciate that respondent No.1-Company was performing public utility services which could not have entered into a Contract of Employment clause like 12(c)(ii) which is opposed to principles of natural justice and the same is arbitrary, unconstitutional, unfair and unreasonable. He further contends that the learned Single Judge has failed to take into consideration what professor wade and professor Forsyth in a book on Administrative Law had opined that a judicial review can be invoked to question

when the contracting authority has exceeded its powers. In the present case, clause 12(c)(ii) being inconsistent with Section 23 of the Contract Act, which is opposed to public policy, is amenable to writ jurisdiction to set-right the wrong caused to the appellant-petitioner.

(g) Learned Senior Counsel relies on the following judgments in support of his case:

i) ***Central Inland Water Transportation Ltd. and another etc. v. Brojonath Ganguly and another*** reported in ***(1986)3 SCC 156;***

ii) ***Delhi Transport Corporation v. D.T.C.Mazdoor Congress*** reported in ***(1991) Supp(1) SCC 600;***

iii) ***U.P.State Co-operative Land Development Bank Limited v. Chandra Bhan Dubey and others*** reported in ***(1991)1 SCC 741;***

iv) ***United India Insurance Co.Ltd v. Manubhai Dharamsinhabhai Gajera*** reported in ***AIR 2009 SC 446;***

v) ***Harjinder Singh v. Punjab State Ware Housing Corporation*** reported in ***(2010)1 SCR 591;***

vi) ***Charu Khurana v. Union of India*** reported in ***(2015)1 SCC 192;***

vii) ***Joseph Shine v. Union of India*** reported in ***(2019)3 SCC 39;***

viii) ***Santosh Mittal v. State of Rajasthan*** reported in ***(2005)4 SCC 771;***

ix) ***LIC of India and another v. Consumer Education and Research Centre and others*** reported in ***(1995)5 SCC 482;***

x) ***ABL International Ltd. & Another v. Export Credit Guarantee Corporation of India Limited & Others*** reported in ***(2004)3 SCC 553;***

xi) ***Air India Statutory Corporation v. United Labour Union and Others*** reported in ***(1997) 9 SCC 377;***

xii) ***Zee Telefilms v. Union of India*** reported in ***(2005)4 SCC 649;***

xiii) ***Board of Control for Cricket (BCCI) in India v. Cricket Association of Bihar*** reported in ***(2015)4 SCC 251;***

xiv) ***Calcutta Gas Company v. State of West Bengal*** reported in ***1962 SCR Supp(1);***

xv) ***Pradeep Kumar Biswas v. Indian Institute of Chemical Biology and others*** reported in ***(2002)5 SCC 111;***

xvi) ***Unnikrishnan J.P. and others v. State of A.P. & others*** reported in ***1993 SCC(1) 645;***

xvii) ***K.S.Puttaswamy v. Union of India*** reported in ***(2017)10 SCC 1;***

Contentions of the learned counsel for the respondents:

10. Per contra, learned counsel appearing on behalf of respondents contends that the appellant-petitioner is an employee of respondent No.1-Company having been appointed by virtue of an appointment letter dated 15.05.2012 and thereafter, due to the reasons stated in the letter dated 24.04.2015 vide Annexure-D, the services of the appellant-petitioner came to be terminated by following clause-12 of the Contract of Employment with regard to termination and paid one month salary in lieu of notice of termination which was stipulated as per the contract between the parties. Learned counsel further contends that it is this termination of employment of the appellant-petitioner that is questioned in the writ petition which having been rejected is impugned in this appeal.

(a) Learned counsel contends that primarily the writ petition is not maintainable as the appellant-

petitioner and respondent No.1-Company are governed by contractual obligations. He further contends that respondent No.1-Company is a private Company registered under the Companies Act, 1956 which does not receive any funds either directly or indirectly from the State Government and neither does it perform any public duty or public functions to come within the ambit of Article 12 of the Constitution of India and hence, the said writ petition would not be amenable to be writ jurisdictions under Article 226 of the Constitution of India.

(b) Learned counsel further contends that merely because respondent No.1-Company is established under the SEZ, it would not come within the purview of receiving or having received funds or privileges from the State Government. No doubt, it is true that CISCO has set up its office established under the SEZ but that by itself would not mean that every unit established under the SEZ Act in its precincts would be construed to receive or have received funds from the State Government for its establishments and its functioning.

He further contends that even if the Company is established under the SEZ Act and carries on commercial activity having impact on the economy, it cannot be treated to be performing public function or public duty.

(c) Learned counsel contends that to come within the ambit of writ jurisdiction, the parties will have to be an instrumentality of the State or receiving funds either directly or indirectly from the State. If they do not come under these two categories, then it should be providing public duty and public functions to fall under the writ jurisdiction. He further contends that the writ jurisdiction is pre-eminently a public law remedy and it would not be available to those persons espousing the cause of private remedy, private wrongs or enforcement of contractual obligations.

(d) Learned counsel further contends that in the present case on hand, admittedly, appellant-petitioner has filed the writ petition seeking to declare clause 12(c)(ii) of the Contract of Employment as illegal, arbitrary, unreasonable, unconscionable, unfair,

contrary to public policy and also contrary to Section 23 of the Indian Contract Act; further seeking to declare it as unconstitutional and consequently, to set aside order of termination dated 24.04.2015 by restoring the appellant-petitioner's status as permanent employee of respondent No.1-Company; and further seeking all consequential benefits arising thereof. He further contends that the very prayer made is *ex facie* apparent that the appellant-petitioner is seeking to enforce contractual obligations against a private Company to set aside her termination and to restore her position as an employee of respondent No.1-Company. This prayer of the appellant-petitioner cannot be granted in a writ jurisdiction under Article 226 of the Constitution of India and therefore, a preliminary objection was raised with regard to the maintainability of the writ itself and rightly so the learned Single Judge accepted the same and dismissed the writ petition.

(e) Learned counsel contends that the remedy under Article 226 of the Constitution of India would not be available to the appellant-petitioner also on the

ground that there is an alternative efficacious remedy available before the appropriate legal forum which liberty has been granted by the learned Single Judge while dismissing the writ petition. He further contends that admittedly, respondent No.1-Company is not a State neither is it performing public function or public duty nor is it a statutory body established under any of the statutes. Respondent No.1 being a private Company would certainly be not amenable to the writ jurisdiction under Article 226 of the Constitution of India.

(f) It is further contended by the learned counsel that the appellant is making a desperate attempt to indirectly achieve something which is directly prohibited under the law. According to him, the services of appellant has been terminated and as stated earlier, appellant is seeking for reinstatement which is again prohibited by law and is traceable to Section 14 of the Specific Relief Act, 1963. The only remedy available to the appellant would be to seek compensation for damages, if any.

(g) Learned counsel further contends that the three essential requirements to come within the jurisdiction of Article 226 of the Constitution of India the respondents should be State or an instrumentality of State, a statutory authority, a private authority discharging public function or public duty which is not forthcoming in the present case on hand. Learned counsel further contends that the appellant has extensively argued to the effect that respondent No.1-Company since situated in the SEZ under the Special Economic Zone Act is amenable to writ jurisdiction as it is discharging public functions. This argument according to the learned counsel is far-fetched as every Company is registered under the statutes like Companies Act, Partnership Act, Limited Liability Partnership Act, Indian Contract Act and Special Economic Zone Act etc. Merely because, respondent No.1-Company is registered under the Companies Act, 1956, it would not qualify to be discharging statutory functions namely, public function or public duty for the purpose of Article 226 of the Constitution of India.

(h) Learned counsel further contends that all these aspects have been elaborately dealt with by the learned Single Judge in a well considered and reasoned order and has rightfully dismissed the writ petition. On the basis of these submissions, he prays for dismissal of this appeal.

(i) Learned counsel appearing on behalf of respondents relies on the following judgments in support of his case:

i) ***Federal Bank Limited v. Sagar Thomas and Others*** reported in ***(2003)10 SCC 733;***

ii) ***KK Saksena v. International Commission on Irrigation and Drainage*** reported in ***(2015)4 SCC 670;***

iii) ***Ramakrishna Mission v. Kago Kunya*** reported in ***(2019)16 SCC 303;***

iv) ***Commissioner, Lucknow Division v. Kumari Prem Lata Misra*** reported in ***(1976)4 SCC 486;***

v) ***State Bank of India and Others v. S.N.Goyal*** reported in ***(2008)8 SCC 92;***

vi) ***Naresh Kumar v. Hiroshi Maniwa and Ors.,*** reported in ***224(2015)DLT 586;***

vii) ***State of Tamil Nadu v. K.Shyam Sunder and Others*** reported in ***(2011)8 SCC 737;***

11. Having heard Sri H.S.Gururaja Rao, learned Senior Counsel appearing on behalf of appellant and Sri Prashanth V.G., learned counsel appearing on behalf of respondents, the points that arise for consideration before us would be-

> *"(i) Whether the impugned order passed by the learned Single Judge in dismissing the writ petition on the ground of maintainability calls for any interference?*
>
> *(ii) What order?"*

RE.POINT NO.(i):

Admitted facts of the case:

12. It is not in dispute that appellant-petitioner was appointed as a Senior Director, AS (Advanced Services) in respondent No.1-Company on 15.05.2012. It is also not in dispute that respondent No.1 is a Private Limited Company registered under the provisions of the Companies Act, 1956 operating one of its units coming under the Special Economic Zone area. It is also not in dispute that neither the Company is created by any

statute of the State nor is it receiving any funds from the State either directly or indirectly. It is also an admitted fact that the appellant-petitioner is bound by contractual obligations securing her employment agreement binding her to the terms and conditions stipulated therein, which is a binding contract between both parties and the same is not disputed.

13. Admittedly, the employment of appellant-petitioner came to be terminated by issuance of notice of termination dated 24.04.2015 (Annexure-D) and she was paid one month salary in lieu of the notice period in accordance to the terms and conditions of the termination clause of the employment agreement. For better understanding, the same is extracted hereinbelow:

> *"April 24, 2015*
>
> *Ms.Jayashree Gururaj*
> *Emp.No.841567*
> *341, Adarsh Palm Retreat*
> *Bellandur Outer Ring Road*
> *Bangalore, Karnataka-560 103*
>
> *Dear Jayshree,*
>
> *Termination of Employment*
> *Further to our meeting on February 19, 2015 and subsequent discussion on April 1, 2015, I confirm that Cisco Systems India*

Pvt., Ltd is terminating your employment with it with immediate effect. Cisco will pay one month of your salary in lieu of notice of termination in accordance with your contract of employment.

You will receive any payments which are required by law to be paid to you, such as payments for any accrued but unused annual leave and any earned but unpaid remuneration up to and including today.

Please ensure that you take steps to immediately return any Cisco property you have in your possession. You will need to sign the termination checklist to acknowledge this has taken place. You are required to reach out to your point of contact Ms. Sonali Ramaiah (sonarama@cisco.com) immediately towards completing the necessary separation formalities.

I remind you that Cisco requires that you observe your obligations that survive the termination of your employment, including your obligations contained in the 'Proprietary Information and Inventions Agreement' signed by you.

Yours sincerely
Sd/-
Seema Nair
Director-HR"

14. Learned Senior Counsel appearing on behalf of the appellant-petitioner, in his erudite submission has canvassed several Doctrines namely, a Doctrine of inequality of bargaining power, a Doctrine of Public Policy, a Doctrine of legitimate expectation and Doctrine

of unexpected repudiation. Thereafter, learned counsel has brought to our attention the characteristics of public function, public utility services, the legality, validity of termination. Learned counsel also vehemently submitted that there is violation and infringement of the rights of the appellant provided under the Constitution of India, namely, the right to work, right to dignity and the obligations of the State under the Constitution. Learned Senior counsel has also argued extensively with regard to the writ petition being maintainable and the role of Courts in dispensation of justice.

15. It is vehemently canvassed by learned Senior Counsel that respondent No.1-Company is set up in the Special Economic Zone which is a creature of the Central Government with an object to provide for an establishment, development and management of Special Economic Zones for promotion of exports and for matters connected therewith.

16. It is the argument of the learned Senior Counsel that initially, the Central Government was operating export processing zones and free trade zones

which was later converted into SEZs. under the provisions of Customs Act, 1962, the Special Economic Zones (SEZ) Rules, 2003 and Special Economic Zones (Customs Procedure) Regulations, 2003; the day-to-day operations SEZ and its units including import and export, inter-unit transfer etc. were governed by these Rules. Learned Senior Counsel took us to the elaborate procedure for establishment of SEZ units, its guidelines and the establishment of respondent No.1-Company within the SEZ zone, the implication of foreign exchange earned from the promotion of goods and services, the creation of employment opportunity with an intention to draw an inference that respondent No.1-Company being engaged in discharge of Governmental and public functions and thereby it would come within the ambit of instrumentality of State. Reliance is placed by the learned Senior counsel to the Seven Judge Bench Judgment of Hon'ble Apex Court in the case of ***PRADEEP KUMAR BISWAS*** (*supra*) and specifically to paragraphs - 45 and 46, which reads thus:

> *"45. These objects which have been incorporated in the Memorandum of*

Association of CSIR manifestly demonstrate that CSIR was set up in the national interest to further the economic welfare of the society by fostering planned industrial development in the country. That such a function is fundamental to the governance of the country has already been held by a Constitution Bench of this Court as far back as in 1967 in Rajasthan Electricity Board v. Mohan Lal where it was said:

> *"The State, as defined in Art.12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people".*

46. We are in respectful agreement with this statement of the law. The observations to the contrary in Chander Mohan Khanna v. NCERT relied on by the learned Attorney-General in this context, do not represent the correct legal position."

17. It is not in dispute that respondent No.1-Company is performing its economic/commercial activities within the SEZ zone under the SEZ Act. But, learned Senior Counsel has not brought to our attention any material to show that respondent No.1-Company is

a creature of State or any statute coming within the purview of the State or that it is performing any public function or public duty in the course of its day-to-day activities. In the case of ***PRADEEP KUMAR BISWAS*** *(supra)*, the Hon'ble Apex Court has held that CSIR was set up in the national interest to further economic welfare of the society and that at paragraph-51 of the said Judgment it is stated as follows:

> *"51. The control of the Government in the CSIR is ubiquitous. The Governing Body is required to administer, direct and control the affairs and funds of the Society and shall, under Rule 43, have authority "to exercise all the powers of the Society subject nevertheless in respect of expenditure to such limitations as the Government of India may from time to time impose". The aspect of financial control by the Government is not limited to this and is considered separately. The Governing Body also has the power to frame, amend or repeal the bye-laws of CSIR but only with the sanction of the Government of India. Bye-law 44 of the 1942 Bye-laws had provided "any alteration in the bye-laws shall require the prior approval of the Governor General in Council"."*

18. It is also stated in paragraph-54 that employees of CISR are governed by Central Civil Services (Classification, Control and Appeals) Rules and the Central Civil Services (Conduct) Rules. Apart from the other financial aid provided by the State and direct control of the State the Hon'ble Apex Court held that CSIR to be amenable to the writ jurisdiction as a State or other authority under Article 12 of the Constitution of India.

19. It would be relevant to mention here that seven Judges Bench of the Hon'ble Apex Court was deciding the matter based on the reference made by the two Judges of the Hon'ble Apex Court in view of the earlier judgment in the case of ***Sabhajit Tewary v. Union of India*** reported in ***(1975)1 SCC 485***, which required consideration in view of the fact that the said Constitution Bench judgment stood for over a quarter century. It would also be relevant to mention here that the Constitution Bench of the Hon'ble Apex Court held in the case of ***Sabhajit Tewary*** *(supra) has held* that

writ petition/application was not maintainable against CSIR as it was not an 'authority' within the meaning of Article 12 of the Constitution of India. In the ratio of 5:2, the seven Bench judgment of the Hon'ble Apex Court held that CSIR to be falling well within the ambit of Article 12 of the Constitution of India and accordingly overruled the earlier judgment in the case of ***Sabhajit Tewary*** *(supra)* which existed over a quarter century based on the essential requirements stated above.

20. Under the above said facts and circumstances of the case, it is hard to accept the contentions of the learned Senior Counsel for the appellant-petitioner that merely because respondent No.1-Company is located within the SEZ zone, it would come within the purview of performing public function or public duty. Hence, the said contention is negatived.

21. It is also vehemently canvassed by learned Senior Counsel appearing for appellant that any covenant enumerated in the employment contract contrary to the public policy would be in violation of

Section 23 of the Indian Contract Act and therefore, it would infringe the fundamental rights provided under Articles 14 and 21 of the Constitution of India. In the present case on hand, admittedly, parties are governed by contractual obligations enumerated in the employment agreement which is binding on the parties. Any violation of the said contractual obligations, conditions and its infraction cannot be decided in the writ jurisdiction as disputed questions of fact are involved. This contention of the learned Senior Counsel for the appellant-petitioner that the portion of the covenant in the contract being opposed to public policy could be gone into in writ jurisdiction is far-fetched and the same cannot be entertained. Accordingly, said contention is negatived.

22. Admittedly, in the present case, the appellant having been appointed in respondent No.1 - Company in a senior position and thereafter, her employment having been terminated based on the covenants stipulated in the employment contract would squarely come within the four corners of the contractual

obligation between two parties, i.e., appellant and respondent No.1 – Company. Admittedly, respondent No.1 – Company is a private limited Company which is not a creature of any statute and neither is it receiving any funds from the Government or any statutory authorities.

23. In the present case, the appellant who is aggrieved by her termination from the employment would have remedy for redressal of her grievance before appropriate forum of civil jurisdiction but not under Article 226 of Constitution of India. It is trite law that when there is alternative efficacious remedy available, the appellant would be bound to seek redressal of her grievance before the appropriate forum and would not be entitled to by-pass statutory provisions as the same will enable appellant to defeat the provisions of statute in the matter of limitation, payment of Court fee or any other penalty or condition so imposed to seek such redressal. Therefore, when there is alternative efficacious remedy, appellant has no

inherent right to approach this Court under Article 226 of the Constitution of India.

24. Having heard the elaborate submissions of the learned counsel and having gone through the records and voluminous authorities relied upon by the learned counsel for the appellant and respondent, we have to see whether respondent No.1 – Company would come within the ambit of Article 12 of the Constitution of India and whether it is amenable to Article 226 of the Constitution of India.

25. In the case of ***PRADEEP KUMAR BISWAS*** *(supra)*, a Seven Judge Bench of the Hon'ble Apex Court while dealing with the similar question considered whether Indian Institute of Chemical Biology would fall within the definition of State or other Authority under Article 12 of the Constitution of India, the test propounded for determining when the corporation will be an instrumentality or agency of the Government as stated in the case of ***RAMANNA DAYARAM SHETTY vs. INTERNATIONAL AIRPORT AUTHORITY OF***

INDIA reported in ***(1979) 3 SCC 489***, were summarized as follows:

> *"(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.*
>
> *(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 corporation being impregnated with governmental character.*
>
> *(3) It may also be a relevant factor whether the corporation enjoys monopoly status which is State conferred or State protected.*
>
> *(4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.*
>
> *(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.*

(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."

26. In view of the aforestated authoritative decision rendered by Seven Judge Bench of the Hon'ble Apex Court, contentions raised contrary to same cannot be eschewed.

27. The appellant will invariably have to satisfy the above stated essential requirements to fall within the ambit of Article 12 of the Constitution of India and being first respondent to be amenable to the writ jurisdiction under Article 226 of the Constitution of India. As we have already held above respondent No.1 - Company is a private limited company, which is not a creature of statute and it does not have any deep or pervasive control by the Government, neither does it have any dominance of the State financially, functionally or administratively, it would not a State or instrumentality of State to fall within the scope of Article 12 of the Constitution of India. In the absence of all

these aspects and there being no control of the Government or any statutory authority over respondent No.1 – Company, it cannot be said that respondent No.1 - Company would come within the ambit of Article 12 of the Constitution of India merely because it was set up in Software Economic Zone under the SEZ Act 2005. Hence, contention of learned counsel for appellant that respondent No.1 - Company would come within the ambit of Article 12 of the Constitution of India cannot be sustained and accordingly, it is negatived.

28. The other contention raised by learned counsel for appellant is to the effect that respondent No.1 - Company is an authority performing public function or public duty. It is no doubt true that a private body can be held to be amenable to writ jurisdiction under Article 226 of the Constitution of India when it performs public function or public duty, but the same comes with a rider that such organization will have to show and establish that it is in-effect discharging public function or public duty and such function must be closely related to those functions

which are performed by the State in its sovereign capacity.

29. This aspect of the matter was elaborately dealt in the case of ***Federal Bank*** *(supra)* at paragraph-29, which was relied upon by the learned counsel for the respondents and also in the cases of ***Ramakrishna Mission*** *(supra)* at paragraphs-31 and 32 and ***K.K.Saksena*** *(supra)* at paragraphs-49 and 53.

30. In the case of ***Federal Bank*** *(supra)*, it has been held:

> *"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, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, are such which do have impact on the economy of the*

country in general. But such activities cannot be classified one falling in the category of discharging duties, functions of public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia (supra). 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 (supra) 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 in the case of Pradeep Kumar Biswas (supra) quoted earlier would also be relevant."

31. In the case of ***Ramakrishna Mission*** *(supra),* the Hon'ble Apex Court has held:

"31. Having analysed the circumstances which were relied upon by the State of Arunachal Pradesh, we are of the view that in running the hospital, Ramakrishna Mission does not discharge a public function. Undoubtedly, the hospital is in receipt of

some element of grant. The grants which are received by the hospital cover only a part of the expenditure. The terms of the grant do not indicate any form of governmental control in the management or day to day functioning of the hospital. The nature of the work which is rendered by Ramakrishna Mission, in general, including in relation to its activities concerning the hospital in question is purely voluntary.

32. Before an organisation can be held to discharge a public function, the function must be of a character that is closely related to functions which are performed by the State in its sovereign capacity. There is nothing on record to indicate that the hospital performs functions which are akin to those solely performed by State authorities. Medical services are provided by private as well as State entities. The character of the organisation as a public authority is dependent on the circumstances of the case. In setting up the hospital, the Mission cannot be construed as having assumed a public function. The hospital has no monopoly status conferred or mandated by law. That it was the first in the State to provide service of a particular dispensation does not make it an

'authority' within the meaning of Article 226. State governments provide concessional terms to a variety of organisations in order to attract them to set up establishments within the territorial jurisdiction of the State. The State may encourage them as an adjunct of its social policy or the imperatives of economic development. The mere fact that land had been provided on a concessional basis to the hospital would not by itself result in the conclusion that the hospital performs a public function. In the present case, the absence of state control in the management of the hospital has a significant bearing on our coming to the conclusion that the hospital does not come within the ambit of a public authority."

32. In the matter of ***K.K.Saksena*** *(supra)*, it came to be held:

"49. There is yet another very significant aspect which needs to be highlighted at this juncture. Even if a body performing public duty is amenable to writ jurisdiction, all its decisions are not subject to judicial review, as already pointed out above. Only those decisions which have public element therein can be judicially reviewed

under writ jurisdiction. In The Praga Tools Corpn. v. C.A. Imanual, as already discussed above, this Court held that the action challenged did not have public element and writ of mandamus could not be issued as the action was essentially of a private character. That was a case where the concerned employee was seeking reinstatement to an office.

53. In the present case, though we have held that ICID is not discharging any public duty, even otherwise, it is clear that the impugned action does not involve public law element and no "public law rights" have accrued in favour of the appellant which are infringed. The service conditions of the appellant are not governed in the same manner as was the position in Anadi Mukta Sadguru."

33. In the present case on hand, admittedly, the appellant is seeking for an order to set aside the order of termination of her service passed by respondent No.1-Company and consequentially for reinstatement and for damages. It is no doubt true that if a person is under the employment of the State or the Government or any of the instrumentality or agency of the State

where the employment is terminated, the aggrieved person would certainly come under the ambit of the writ jurisdiction, but in the matter of employment in a private Company which has nothing to do with the State or the Government or not coming under the control of the State, such Company would certainly not be amenable to the writ jurisdiction.

34. It is trite law that primarily, the appellant will have to satisfy the aforestated requirement to come within the ambit of Article 12 of the Constitution of India to be amenable under Article 226 of the Constitution of India. This aspect of the matter was elaborately dealt in the case of ***State Bank of India*** *(supra)* wherein the Hon'ble Apex Court has held in paragraph-17 as under:

> *"17. Where the relationship of master and servant is purely contractual, it is well settled that a contract of personal service is not specifically enforceable, having regard to the bar contained in section 14 of the Specific Relief Act, 1963. Even if the termination of the contract of employment (by dismissal or otherwise) is found to be illegal or in breach, the remedy of the employee is only to seek*

damages and not specific performance. Courts will neither declare such termination to be a nullity nor declare that the contract of employment subsists nor grant the consequential relief of reinstatement. The three well recognized exceptions to this rule are:

> *(i) where a civil servant is removed from service in contravention of the provisions of Article 311 of the Constitution of India (or any law made under Article 309);*
>
> *(ii) where a workman having the protection of Industrial Disputes Act, 1947 is wrongly terminated from service; and*
>
> *(iii) where an employee of a statutory body is terminated from service in breach or violation of any mandatory provision of a statute or statutory rules.*

There is thus a clear distinction between public employment governed by statutory rules and private employment governed purely by contract. The test for deciding the nature of relief-damages or reinstatement with consequential reliefs-is whether the employment is governed purely by contract

or by a statute or statutory rules. Even where the employer is a statutory body, where the relationship is purely governed by contract with no element of statutory governance, the contract of personal service will not be specifically enforceable. Conversely, where the employer is a non-statutory body, but the employment is governed by a statute or statutory rules, a declaration that the termination is null and void and that the employee should be reinstated can be granted by courts. (Vide S.B.Dutt (Dr.) v. University of Delhi, U.P.Warehousing Corpn. v. Chandra Kiran Tyagi, Sirsi Municipality v. Cecelia Kom Francis Tellis, Vaish Degree College v. Lakshmi Narain, J. Tiwari v. Jwala Devi Vidya Mandir and Dipak Kumar Biswas v. Director of Public Instruction.)"

35. In view of the above judgment, it is clear that without any ambiguity, with regard to the facts of the present case where the appellant was employed in a private Company and her services having been terminated by payment of one month salary is purely a contract of private employment which is nowhere similar to being a public employment. Therefore, the appellant

cannot seek remedy under the Public Law, when her contract of employment is private in nature. Ofcourse, the appellant would have remedy elsewhere but not under the writ jurisdiction under Article 226 of the Constitution of India.

36. In view of the above authoritative judgments of the Hon'ble Apex Court juxtaposed with the facts of the present case, it is clearly apparent that respondent No.1 - Company would not fall under the following categories:

a. It is not a State or instrumentality or agency of the State;
b. It is not a creature of any statute;
c. It does not come under the control of the State either financially or administratively;
d. It does not perform any public function or public duty and there is absence of public law element;
e. It does not come under the category or definition of 'any other authority';

37. In view of the above elaborate discussion and taking into consideration the voluminous authorities submitted by the parties, we are of the considered view that respondent No.1-Company cannot be termed to fall

within the definition of Article 12 of the Constitution of India and accordingly, it would not be amenable to a writ jurisdiction under Article 226 of the Constitution of India, as it is not a State nor does it come within the purview of an instrumentality of State or agency of State. Hence, the order of the learned Single Judge would not call for interference.

RE.POINT NO.(ii):

For aforesaid reasons, we are of the view that appeal lacks merit and we do not find any cogent reason to interfere with the order passed by the learned Single Judge. Hence, we proceed to pass the following:

ORDER

i) Writ Appeal is ***dismissed***;

ii) Order dated 06.10.2016 passed in WP.No.19726/2015 is affirmed;

iii) No order as to costs.

Sd/-
JUDGE

Sd/-
JUDGE

LB/VK: