(1984) 03 KL CK 0025

In the High Court Of Kerala

Case No : O.P. No. 4277 of 1979

M. Kunju Mohammed and Others — APPELLANT

Vs

State of Kerala and Others — RESPONDENT

Date of Decision : 22-03-1984

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 311

Citation : (1984) KLJ 449

Hon'ble Judges : K. Bhaskaran, Acting C.J.;V. Bhaskaran Nambiar, J;P. C. Balakrishna Menon, J;M. P. Menon, J;G. Balagangadharan Nair, J

Bench : Full Bench

Advocate : G. Janardana Kurup, for the Appellant; P. V. Ayyappan, Advocate General, B. S. Krishnan and M. A. Manhu, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskaran Namhiar, J.—In 1976. a Full Bench of this Court in Copula Pillai v. S. S. I. Corporation (1978 KLT 347 (F.B.)) held that a "Corporation which has been registered as a company under the Companies Act cannot be regarded as a State for the purpose of Article 12 of the Constitution". Is this decision still good law especially after the subsequent pronouncements of the Supreme Court on the subject? This accounts for the constitution of a larger Bench to dispose of this writ petition. Two of us (Bhaskaran Ag. C.J. & Bhaskaran Nambiar, J.) had occasion to consider this aspect in a recent decision in Sofhi v. F.A.C.T. (1984 KLT 32) when the question was raised whether F.A.C.T. (Fertilisers and Chemicals Travancore Ltd.), a registered company, is a State amenable to the writ jurisdiction of this Court. Surveying the decisions of the Supreme Court beginning with Rajasthan Electricity Board''s case in 1967 and ending with Ajay Hasia''s case in 1981 and applying the principles stated therein it was held that F.A.C.T. is a State, subject to the writ discipline of this Court.

2. Article 12 of the Constitution, defining "State" for the purposes of Part III reads thus:

In this part, unless the context otherwise requires, "The State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

3. And in Smt. Ujjam Bai Vs. State of Uttar Pradesh, it was observed thus:

Again. Art. 12 winds up the list of authorities falling within the definition by referring to "other authorities" within the territory of India which cannot obviously be read as ejusdem generis with either the Government and the Legislature or local authorities. The words are of wide amplitude and capable of comprehending every authority created under a statute and functioning within the territory of India or under the control of the Government of India. There is no characterisation of the nature of the "authority" in this residuary clause and consequently it must include every type of authority set up under a statute for the purpose of administering laws enacted by the Parliament or by the State including those vested with the duty to make decisions in order to implement those laws.

4. Subsequently in a series of decisions, the Supreme Court had to consider the scope of the expression "State" occurring in Article 12 and it is noteworthy that there has been a steady expansion of the content of the expression "other authorities" in Article 12 by a gradual process of judicial reasoning extending over a decade. Initially the concept of "other authority" was confined to constitutional or statutory authorities. Eventually it has been held that it is irrelevant whether the Corporation/Company is created by or under a statute and the true test is whether it is an instrumentality of the State or agency of the Government. "The enquiry has to be not as to how the juristic person was born but why it has been brought into existence. The corporation may be a statutory corporation created by statute or it may be a Government company or a company formed under the Companies Act, 1956 or it may be a society registered under the Societies Registration Act, 1860 or of other similar statute. "The relevant tests gathered from the decision in the International Airport Authority''s case were summarised as follows in the Ajay Hasia''s case:

(1) One thing is clear that if the entire share capital of the corporation is held by Government it should 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 Stale 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 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.

5. The latest decision by the Supreme Court brought to our notice is in B.S. Minhas Vs. Indian Statistical Institute and Others, . Their Lordships held thus:

Reliance was placed upon Ajay Hasia v. Khalid Mujib Schrevardi. The Constitution Bench in that case took the view that the expression ''other authorities'' in Article 12 must be given a broad and liberal interpretation, where constitutional fundamentals vital to the maintenance of human rights are at stake and functional realism and not facial cosmetics must be the diagnostic tool, for constitutional law must seek the substance and not the form. The Court pointed out that the Government may act through the instrumentality or agency of juridical persons to carry out its functions, since, with the advent of the welfare State, its new tasks have increased manifold and such juridical persons acting as the instrumentality or agency of the Government must therefore be subject to the same discipline of fundamental rights as the State.

An authority is a State within the meaning of Article 12 of the Constitution if it is an instrumentality or agency of the Government. A decision on this question shall have due regard to the tests formulated and summerised in F.A.C.T. case as follows:

(a) The entirety or a massive majority of the share capital in the hands of the Government is a penetrating index that it is an instrument or agent of the Government.

(b) Deep and pervasive" stale control is an affirmative assurance that it is Government agency or instrumentality. This can be gathered from the following surrounding circumstances as well:

(i) Domination in the composition of the Society or company by the representatives of the government.

(ii) Obedience to the directions of the Government for the performance of its functions.

(iii) The concurrence or approval of the Government for making rules and regulations.

(iv) The accounts requiring scrutiny and satisfaction of the Government.

(v) The effective control of the affairs of the Society Corporation by the Government.

(c) Substantial financial assistance by the Government meeting practically the entire expenditure of the Company gives an added colour and flavour of Governmental agency.

(d) The public importance of the functions, in its nature allied to Governmental activity is also yet another vital indication.

(e) Monopoly status of the Corporation either conferred or protected by the State.

(f) Statutory origin of the Corporation/Company may be the hall mark of "State", but the absence of this birth mark need not exclude it from the expansive area of ''State'' within Article 12.

6. The earlier Full Bench ruling in Gopala Pillai v. S. S. I. Corporation (1978 KLT 347) in fact followed two decisions of the Supreme Court--(1) Sabhajit Tewary Vs. Union of India (UOI) and Others, ; (2) Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, . The Full Bench noted that the Supreme Court had in Sabhajit Tewary Vs. Union of India (UOI) and Others, held that the companies in those cases were not departments of the Government. The question, as we understand, is not whether the companies are departments of the Government, for, it is nobody''s case, they are departments of the Government. They are separate juristic entities, never treated as departments of Government, their employees having no status as civil servants. An employee in a company is not a member of a civil service and cannot claim the constitutional immunity under Art. 311.

7. Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, was expressly referred to and distinguished in Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others, . Sukhdev Singh''s case related to three juristic bodies, the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation and all the three institutions have statutory parentage as the hall mark of their existence. The Supreme Court in that case was therefore not concerned "with the question whether a company or society formed under a statute can be an "authority" or not.

8. Thus, in view of Ajay Hasia''s case, and the later decisions of the Supreme Court following the same we cannot but overrule Gopala Pillai v. S.S.I. Corporation (1978 KLT 347(FB)) when it was decided that no Government Company can be an "authority" under Article 12, amenable to the writ supervision of this Court. A Government company can still be an authority within the meaning of Article 12 if it is an instrumentality of the State. Accordingly we approve Sofhi v. F.A.C.T. (1984 KLT 32) on this aspect. Applying these principles, the main question in this Original Petition is whether SIDECO (Kerala State Industrial Development and Employment Corporation Ltd.), a government owned company is a "State" within Article 12 of the Constitution. All the shares of the

company are vested in the Government and the company is rightly described as a Government owned company. The Directors of the company are representatives of the Government. The Directors shall reserve for the decision of the Governor and take action only, after the approval of the Governor is obtained, in respect of any programme of capital expenditure involving 50 lakhs and above, of disposal of fixed assets of the Corporation exceeding 25 lakhs and for the formations of the companies as subsidiaries to the Corporation. The following matters shall require the prior approval of the Governor:

(i) Appointment to posts carrying salary of more than Rs. 2250/- p.m.

(ii) Any programme of capital expenditure for an amount exceeding Rs. 10 lakhs in cases which do not form part of the sanctioned estimate.

(iii) Agreements involving foreign collaboration proposed to be entered into by the Company.

(iv) Division of capital into different classes of shares.

(v) Sale, lease of disposal of the whole or substantially the whole of the undertaking of the company and the purchase of any property of value of more than Rs. one lakh.

(vi) Formation of or assumption of the control of a subsidiary company.

(vii) Winding up of the Company.

(viii) Foreign tours by Directors, officers or employees of the company or business matters or for study purpose or otherwise shall be undertaken only with the prior sanction of Governor.

(ix) Rules of the company governing the conditions of service of employees P.F. and other rules, creation of reserve and other funds.

(x) Revision of scales of pay, D.A., T.A. etc., of the employees, of the company.

(xi) Annual plans of development and capital budget of the company.

(xii) Any other matter which, in the opinion of the Chairman be of such importance as to be reserved for approval of the Governor.

Moreover,

Notwithstanding anything contained in any of the articles, the Governor may from time to time issue such directions or instructions as he may consider necessary in regard to the affairs or the conduct of the business of the Company or Directors thereof and in like manner may vary and annul any such direction or instruction. The Directors shall duly comply with and give immediate effect to directions or instructions so issued.

The Auditors of the company are to be appointed by the Central Government on the advice of the Comptroller and Auditor General of India. Practically the entire financial assistance is given by the Government. The Company has as its objective to aid, counsel, finance and protect and promote the interests of Small Industries in the State, stabilise and run any Industrial Undertakings, Projects or Enterprise whether owned or run by Government, statutory body, Company etc., to promote employment and entrepreneurship among the skilled, semi-skilled, trained, experienced and educated members of the public, to promote and operate schemes for industrial development etc.

9 It is thus clear that SIDECO is an instrumentality of the State and thus "State" within the meaning of Article 12 of the Constitution and hence bound by the Constitutional corrective in writ jurisdiction.

10. next question, on the facts of this case, is whether the petitioners are entitled to the grant of any writ or appropriate direction under Article 226 of the Constitution against SIDECO. Only some brief facts are necessary to decide this point.

11. The petitioners, engineering graduates, selected by the Public Service Commission for appointment in Government service were appointed an Junior Engineers (Subsequently re-designated as Asst. Engineers) in the Kerala State Small Scale Industries Development Corporation (for short K.S.S.I.C.) which was amalgamated with Kerala State Small Industries Development and Employment Corporation Ltd. (SIDECO) along with yet another corporation, Kerala Employment Promotion Corporation, in 1975.

Assistant Executive Engineers in accordance with Ext. P6 (rules) from 4-12-1979, the date of Ext. R2. These orders will be issued within a month from the date of this judgment. It is conceded that if Ext. R2 is set aside, the petitioners are entitled to be appointed to those vacancies as they have the qualifications and experience prescribed by the rules. Respondents 2 and 3 knew about the illegality of the appointments when this writ petition was filed in 1979 and notice was taken to them early in 1980. It is now 1984. Ext. P6 rules continue to remain in force. They have not been replaced by common rules. The Corporation never set right the error. They did not even pause to re-examine the issue. They have not attempted to review or revise the order. Even now they justify their wrong stand. The petitioners need not suffer for the Corporation''s failure to follow the rule. The Corporation shall pay the petitioners the salary and allowances due to them as Assistant Executive Engineers from 4-12-1979, when they were entitled to be appointed to the service. As respondents 4 to 7 have been working as Assistant Executive Engineers, though under wrong orders, they cannot be denied the wages for the work done and hence no steps need be taken to recover, salary or allowance from them on the ground that their appointments are now set aside. The Corporation can only blame themselves for this unfortunate situation when they have to pay two sets of employees for the same period.

In the result the Original Petition is allowed quashing Ext. R2, proceedings No.

PER(1) 34187/79 dated 4th December, 1979 issued by the Managing Director, Kerala State Small Industries & Employment Corporation Limited (2nd respondent), so far as respondents 4 to 7 are concerned and we direct the Corporation to proceed in accordance with this Judgment and in accordance with law.

The 2nd respondent will pay the cost of the petitioners.

