

PETITIONER:
HINDUSTAN STEEL WORKS CONSTRUCTION LTD.

Vs.

RESPONDENT:
STATE OF KERALA AND OTHERS

DATE OF JUDGMENT: 22/04/1997

BENCH:
G.N. RAY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

G.N. RAY, J.

Leave granted. Heard learned counsel for the parties.

The short question that arises for decision in this appeal is whether the appellant which is government company wholly owned and controlled by the Central Government is excluded from the purview of the Kerala Construction Workers Welfare Funds Act 1989 (Act No.20 of 1989) hereinafter referred to as the Welfare Funds Act.

The appellant company entered into an agreement for construction of a stadium at Kaloor, Ernakulam, Kerala with the respondent No. 2 Greater Cochin Development Authority. The terms of the contract inter alia stipulated that sub contractors to be employed by the appellant for execution for the contract were to be approved by the respondent No.2. The appellant commenced work of construction of stadium and from time to time engaged different contractors on a turnkey basis.

The respondent No.2 started making deduction from the part payment of the bills raised by the appellant at the rate of 1% of the billed amount for the works executed by the appellant on account of contribution under the Welfare Funds Act and the schemes framed thereunder. The appellant company protested against such deduction by the respondent No.2 by contending that the appellant being a company wholly owned and controlled by the Central Government did not come within the purview of the Welfare Funds Act.

For the purpose of appreciating rival contention of the parties to the appeal the following provisions of the Welfare Funds Act are set out here under:

Section 2. Definition - In this Act, unless the context otherwise requires.

(a) (b)

(c) "Construction Work" means any construction work carried out by the State Government or quasi-governmental agency or by a public or private undertaking or by a Society or by private individual

and includes construction of any building, road, pathway, causeway, bridge, culvert, canal, tank, channel, pond, dam, tunnel, sea walls, walls for the prevention of soil erosion, embankments, bunds, drainage, kanas, culverts jetties, compound walls, will and the like, breaking of rocks and rubbles and the repair in whatsoever manner relation thereto and the demolition thereof but does not include the construction works relating to places of public worship or construction work for a residence by a person for his own residential purposes costing not more than Rs.one lakh, repair works other than extensions and reconstruction of his residence, construction work undertaken, by the Government of India or any of its establishments or institutions.

(d)

(e) "Contractor" means any person registered as a Contractor with any Department of the Government of Kerala or with any Department of any other State Government, or with any local authority or with the Kerala Water Authority or Devaswom Boards of Universities in the State, for carrying out construction consideration for a Government Company as defined in S. 617 of the Companies Act 1956 (Central Act I of 1956) for any Board, Corporation or Society owned or controlled by the Government of Kerala and includes the Kerala State Construction Corporation.

(f)

(g) "Employer: means,

(i) In the case of construction work undertaken for the State Government or for the Local Authority or for the Kerala Water Authority or for any Universities in the State for Kerala Government Company as defined in Section 617 of the Companies Act, 1956 (Central Act I of 1956) or for a Board, Corporation or a Society owned or controlled by the Kerala Government, the contractor;

(ii) In any other case, the person for whom construction work is done."

"Section B. Contribution to the Fund (1) A member of the Fund shall contribute to the Fund at the rate specified in any of the slabs hereunder:

SLAB

A. Ten rupees per month

B. Fifteen rupees per month
C. Twenty rupees per month
Provided that a member may change his rate of contribution at his option at the commencement of any year.

(2) An employer shall contribute one percent of the cost of the construction work undertaken by him to the fund.

(3) In case where the employer is a Contractor, the contribution payable under sub-section (2) shall be recovered by the Departments, Authorities, Company or other undertakings mentioned in item (I) in clause (g) of Section 2 for the bills payable to the contractor and paid to the Fund within fifteen days in the manner prescribed. In the case of other employers, the contribution shall be paid in such manner to such authority and within such time as may be prescribed.

(4) The Government shall pay to the Fund every year an amount by way of grant which shall not be less than ten per cent of the Contribution initially made by a member of the Fund under sub-section (I).

The appellant company's case is that the appellant company is wholly owned and controlled by the Government of India. The President of India is vested with the absolute power to appoint and remove the Directors. Each activity of the company is controlled by the Central Government. For such deep and pervasive control of the appellant company by the central government, the appellant is essentially an establishment or an institution of the Government of India.

It may be stated here that several writ petitions were filed in the Kerala High Court challenging the validity of Welfare Funds Act and by a common judgement dated 7.4.1993 passed by the Single Bench of the Kerala High Court the said writ petition were disposed of inter alia holding that (i) Section 2(g) and 8(2) of the Welfare Funds Act and clauses 25 and 26 of the scheme framed under the Act are valid (ii) Section 9 is ultravires and void (iii) contributions are payable under Section 8 of the welfare Funds Act only in respect of works awarded as commenced after 7th August 1990.

The decision was given in the said judgment disposing of writ petition directing that the Board shall adjust contribution received from any of the said petitioner towards construction for works awarded and commenced after 7th August 1990 and refund the excess is any to the writ petitioners.

According to the appellant company, the said writ petitioners were contractors registered with the public works department of the State of Kerala and none of the said writ petitioner was a company wholly owned and controlled by the Government of India like the appellant company. Hence, the appellant company's claim for exemption was not available to the other writ petitioners. When the claim for exemption of the appellant company was not acceded to the appellant company moved a writ petition before the Kerala High Court. Since the decision of the Single Bench of the Kerala High Court was assailed in Letter Patent Appeals

before the Division Bench of the Kerala High Court by the aggrieved writ petitioners, the writ petition filed by the appellant company was heard and disposed of along with other writ appeals challenging the validity of the Welfare Funds Act and by a common judgment, the petition of the appellant company was disposed of by considering the question of vires of the Act without considering the claim of exemption by the appellant company being a wholly owned and managed company of the Central Government. The appellant then filed a special leave petition being SLP (Civil) No. 26450 of 1995. By order dated December 8, 1995 this court disposed of the said special leave petition by giving liberty to the appellant company to approach the Kerala High Court by filing a review petition. Such review petition being R.P. No. 9 of 1996 in O.P.No. 11626 of 1994 has been dismissed by the Kerala High Court by order dated January 15, 1996 and this appeal is directed against such decision of the Kerala High Court.

Mr. Dipankar Gupta, the learned Senior counsel appearing for the appellant has contended that the appellant company is fully owned by the Central Government. The board of management of the appellant company consists of persons nominated by the Central Government. There is deep and pervasive control of the Central Government of all the activities of the appellant company. The appellant company is not only a 'State' within the meaning of Article 12 of the Constitution by fulfilling the criteria laid down by this Court is various decision but for all intents and purposes, the appellant company is essentially an undertaking or establishment of the Central Government.

Mr. Gupta has contended that 'construction work' under Section 2(c) of the Welfare Funds Act does not include construction work undertaken by the Government or any of its establishment or institution. Hence, the construction work undertaken by the appellant company being establishment or institution of the Central Government cannot be held to be construction work under Section 2[c] of the Welfare Funds Act. In support of his contention, Mr. Gupta has referred to the Constitution Bench decision of this Court in *Ajay Hasia and other Vs. Khalid Mujib Sehravardi and Other* (1981) SCC 722. In the said decision, it has been held by this Court that the court should give such an interpretation to the expression "other authorities" referred to in Article 12 of the Constitution as will not stultify the operation in relation to the fundamental rights by enabling the government to its obligation in relation to the fundamental rights by setting up an authority to act as its instrumentality or agency for carrying its functions. Where constitutional fundamentals, vital to the maintenance of human right are at stake, functional realism and not facial cosmetics must be diagnostic tool, for constitutional law must seek the substance and not the form. This Court has also indicated that the government may act through its instrumentality or agency of natural persons or it may employ the instrumentality or agency of judicial persons to carry out its functions. It has been held that the government, in may of its commercial ventures and public enterprises, is resorting to more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantage and at the same time does involve the slightest diminution in its ownership and control of the undertaking. In such, cases, the true owner is the State, the real operator is the State and the effective controller is the State and accountability for its actions to the community and to Parliament is of the

State. Even then, the corporation is a distinct juristic entity with a corporate structure of its own. It has also been indicated by this Court that if a corporation is an instrumentality or agency of the government, it must be subjected to the same limitations in the field of constitutional law as the government itself, though in the eye of the law, it would be distinct and independent legal entity.

Mr. Gupta has submitted that this Court has also noticed that in view of the inadequacy of the civil service to deal with new problems which came to the realised, it became necessary to forge a new instrumentality or administrative device for handing these new problems. It was in these circumstance and with view to supplying the administrative need that the "Corporation came into being as the third arm of the government and over the year it has been increasingly utilised by the government for setting up and running public enterprises and carrying out other public functions."

(Emphasis supplied)

Mr. Gupta therefore submitted that it will be only appropriate to accept the appellant company as a third arm of the government being an establishment of the government for the purpose of exemption from the purview of the Welfare Fund Act.

In this connection, Mr. Gupta has also referred to another decision of this Court in C.V. Raman Vs. Management of Bank of India and another (1988 (3) SCC 105). In the said case, this Court has taken into consideration of the enforcement of Tamil Nadu Shops and Establishments Act and similar acts in other states to the State Bank of India and the nationalised banks. It has been held in the said decision that the State Bank of India and the nationalised banks are establishments under the central Government within the meaning of Clause (a) of Section 4(1) of Tamil Nadu Shops and Establishments Act as well other parimateria Shops and Establishment Acts in other states. In the said case, the contention of the employees of the banks was that the banks being autonomous corporations having distinct juristic entity with a corporate structure of their own, cannot be treated to be owned by the Central Government and the expression "under the Central Government" connotes complete control in the sense of being owned by the Central Government. Such contention, however, has not been accepted by this Court. The contention that since Article 12 of the Constitution occurs in Part III of the Constitution dealing with the fundamental rights, the decisions in the cases dealing with Article 12 of the Constitution cannot be made the basis for contending that the State Bank of India and the nationalised banks are establishments under the Central Government under the Shops and Establishment Act, has also not been accepted by this Court in C.V. Raman's case. It has been held that even though the decisions relating to instrumentality or agency of the government were made in connection with the fundamental right, but in view of the construction of the expression "State or other authorities" under Article 12 of the Constitution, it cannot be gainsaid that the salient principle which have been laid down in the decisions dealing with the import of Article 12 of the Constitution with regard to the authorities having a corporate structure and exercising autonomy in certain spheres, will certainly be useful for determining as to whether the State Bank of India and the nationalised bank are establishments under the Central Government for the purpose of enforceability of the Shop and Establishment Act.

Mr. Gupta has submitted that the position of the autonomous bodies being instrumentalities and agencies of the government on account of administrative need and functioning as 'third arm' of the government as noticed in Ajay Hasia's case has been relied by this Court in C.V. Raman's case. Mr. Gupta has contended that it has been indicated in paragraph 12 of the judgment in Raman's case that if the criteria laid down in Ajay Hasia's case as quoted in the decision, is applied to the fact of the case of C.V. Raman, it is obvious that even though the State Bank of India and the nationalised banks may not be owned by the Central Government and its employees may not be the employees of the Central Government, they will certainly fall within the purview of the expression "under the Central Government" in view of the existence of deep and pervasive control of the Central Government over these banks.

Mr. Gupta has, therefore, submitted that the appellant is essentially a government establishment for all intents and purposes and therefore is entitled to get exemption from the purview of the Welfare Funds Act by treating it as an establishment of the Central Government.

Such contention of Mr. Gupta has, however, been disputed by Mr. R. Nariman, Senior Counsel appearing for the respondent No. 2, Greater Cochin Development Authority. Mr. Nariman has submitted that the decision in Ajay Hasia's case was made in the context of preserving the fundamental rights of the citizen of India vis-a-vis the government and its departments and also the agencies and instrumentalities of the government in respect of which the government has deep and pervasive control. In the instant case, the question of enforcement of fundamental rights is not involved. Moreover, the Welfare Funds Act is a beneficial legislation enacted for the purpose of ensuring protection and welfare of the employees. Mr. Nariman has also submitted that in C.V. Raman's case, this Court has kept in view the welfare measures and in order to ensure welfare measures, it has held that the State Bank of India and nationalised banks are establishment under the Central Government for the purposes of Shops and Establishment Act. In the instant case, the government company is trying to get out of the beneficial measures under the Welfare Funds Act which has been enacted to protect the interest of the labourers. Such beneficial object under the Act should not be allowed to be frustrated by expanding the meaning of instrumentality or agency of the Central Government. Mr. Nariman has further submitted that even if on account of any ambiguity two interpretations are possible, the one which will go to the benefit of labourers must be accepted so that the purpose of the Act is not frustrated. Mr. Nariman has also submitted that the appellant is a public undertaking. Referring to Clause (c) of Section 2 of the Welfare Fund Act, Mr. Nariman has submitted that the expression "Construction Work" undertaken by the Government of India or any of its establishments or institution is very significant. Mr. Nariman has also submitted that Clause (e) of Section 2 of the Welfare Funds Act defines "Contractor" and according to the definition under Clause (e) of Section 2, Contractor means any person registered as a contractor for carrying out construction work for consideration for a government company for any State corporation or society made by the Government of Kerala and includes Kerala State Government Corporation. Mr. Nariman has submitted that the legislature has intended to include government company as a contractor in Clause (e) and if the legislature has intended to exclude government Company or public undertaking for the purpose of Section

2(e), there would have been specific exclusion of such government company but such exclusion has deliberately not been made in Clause 2(e). Therefore, the appellant company cannot claim exemption from the purview of the Welfare Funds Act.

Mr. Sreekumar, learned counsel appearing for the respondent No.3, namely, the Construction Workers for the Welfare Board, has also disputed the contentions made by Mr. Gupta. Mr. Kumar has submitted that the appellant is a government company and claim that being a government company it should get exemption from the enforcement of the Welfare Funds Act. Mr. Kumar has submitted that the government Company has been defined under Section 617 of the Companies Act. The government company means any company in which not less than fifty one percent of paid share capital is held by the Central Governments and includes a company which is a subsidiary of the Government Company. Hence, only with 51% of paid up share capital belonging to the Central Government or to the State Government or to both, a company will be held to be a government company even though such company cannot be held to be fully owned by the government. By the definition of government company under the Companies Act, the government company need not necessarily be company fully owned by the Government and by that process an instrumentality of the government. Hence, claim of exclusion from the purview of the Act simply on account of being a government company cannot be accepted. Mr. Kumar has also supported the contention made by Mr. Nariman that the appellant Company having undertaken the contractual work as a commercial venture should not be permitted to claim exemption from the purview of the Welfare Funds Act against the interest of the poor labourer for whose benefit the said Act has been enacted. He has, therefore, submitted that no interference is called for by this Court and the appeal should be dismissed.

After giving our careful consideration to the facts of the case and the respective contention made by the learned counsel for the parties, it appears to us that the appellant company cannot be held to be a department of the government. There may be deep and pervasive control of the government over the appellant company and the appellant company, on such account may be an instrumentality or agency of the Central Government and as such a 'State' within the meaning of Article 12 of the Constitution. Even though the appellant company is an agency or instrumentality of the Central Government, it cannot be held to be a department or establishment of the government in all cases. Such instrumentality or agency has been held to be a third arm of the government in *Ajay Hasia's case* but it should not be lost sight of that it was only in the context of enforcement of fundamental rights against the action of government and its instrumentalities or agencies it was held that such agencies were the third arm of the government and they cannot avoid constitutional obligation. There is no question of enforcing any fundamental right in the instant case. On the contrary, the question of protecting the welfare of the employees vis-a-vis the instrumentality or agency of the Central Government under the Welfare Funds Act is to be kept in mind for the purpose of deciding the rival contention of the parties. If clauses 2 [c] and [e] of the Welfare Funds Act are taken into consideration, it will be quite apparent that the legislature has not intended to exclude the government company or the statutory corporations from the purview of the Welfare Funds Act. The decision in *C.R. Raman's case*, in our view, is not an authority for the

proposition that an instrumentality or agency of government is essentially a government department for all purpose and such instrumentality or agency will enjoy the same privilege and protection which any government or its establishment or department enjoys in relation to a statute. The establishment of a government only connotes in its plain meaning, an establishment directly run by the government and not through the agency or instrumentality of the Government. The Welfare Funds Act is essentially an act to protect the interest of and welfare of the labourers. Unless expressly the instrumentality or agency of the government is kept outside the purview of the said Act, it would not be proper to interpret the said Act in a wide amplitude by removing the corporate veil so as to exclude such instrumentality or agency from the purview of the said Act.

We, therefore, do not find any reason to interfere with the impugned decision of the Kerala High Court and this appeal, therefore, fails and is dismissed. There will be, however, no order as to cost.