



WA NO. 691 OF 2023

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE ANU SIVARAMAN

&

THE HONOURABLE MR. JUSTICE C.PRATHEEP KUMAR

FRIDAY, THE 19<sup>TH</sup> DAY OF JANUARY 2024 / 29TH POUSHA, 1945

WA NO. 691 OF 2023

AGAINST THE JUDGMENT IN WP(C) 9928/2023 OF HIGH COURT OF  
KERALA

APPELLANTS:

- 1 WELFARE ASSOCIATION OF KITCO EMPLOYEES (WAKE),  
AGED 50 YEARS  
ROOM NO. 102, FEMITH'S P.B. NO. 4407, PUTHIYA  
ROAD, NH BYPASS, VENNALA, KOCHI, REPRESENTED BY  
ITS GENERAL SECRETARY, MR. RAJEEV G, PIN - 682028
- 2 BOBY P. THEKKAN,  
AGED 54 YEARS  
SPECIAL ASSISTANT GRADE I (DRAUGHTSMAN), KITCO  
LTD., MM GARDENS, CHURCH LANDING ROAD, KOCHI, PIN  
- 682016
- 3 SREEKUMAR M,  
AGED 61 YEARS  
SINDHOORAM, HOUSE NO. J-33A, JYOTHI NAGAR,  
KESAVADASAPURAM, PATTOM P.O., THIRUVANANTHAPURAM,  
PIN - 695004

BY ADVS.  
ABRAHAM JOSEPH MARKOS  
V.ABRAHAM MARKOS  
ISAAC THOMAS  
P.G.CHANDAPILLAI ABRAHAM  
ALEXANDER JOSEPH MARKOS  
SHARAD JOSEPH KODANTHARA  
JOHN VITHAYATHIL  
AIBEL MATHEW SIBY



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**RESPONDENTS :**

- 1 KERALA INDUSTRIAL AND TECHNICAL CONSULTANCY ORGANISATION (KITCO),  
M M GARDENS, CHURCH LANDING RD, PALLIMUKKU, KOCHI,  
REPRESENTED BY ITS MANAGING DIRECTOR, PIN - 682016
- 2 SMALL INDUSTRIES DEVELOPMENT BANK OF INDIA,  
SIDBI TOWER, 15, ASHOK MARG, LUCKNOW, UTTAR  
PRADESH, REPRESENTED BY ITS CHAIRMAN & MANAGING  
DIRECTOR, PIN - 226001
- 3 GOVERNMENT OF KERALA,  
DEPARTMENT OF INDUSTRIES & COMMERCE, SECRETARIAT,  
THIRUVANANTHAPURAM, REPRESENTED BY ITS PRINCIPAL  
SECRETARY, PIN - 695001
- 4 UNION OF INDIA,  
MINISTRY OF FINANCE 3RD FLOOR, JEEVAN DEEP  
BUILDING SANSAD MARG, NEW DELHI, REPRESENTED BY  
ITS JOINT SECRETARY. \*ADDL.R5 IMPLEADED, PIN -  
110001
- 5 ADDL.R5:(KITCO EMPLOYEES UNION),  
ARA 54 A, AA IBRAHIM ROAD, THRIKKAKARA P.O.,  
KOCHI-682021. , REPRESENTED BY ITS GENERAL  
SECRETARY, THOMAS DAMIAN, AGED 46 YEARS, SON OF  
P.J.JOSEPH, RESIDING AT PALIYATHARA HOUSE,  
OTHUPALLIPARAMBU ROAD, VAZHAKKALA, THRIKKAKARA  
P.O., KOCHI - -682 021. \*ADDITIONAL R5 IMPLEADED  
AS PER ORDER DATED 31/7/23 IN IA 1/23 IN WA  
691/23.



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BY ADVS.  
M.GOPIKRISHNAN NAMBIAR  
B.ASHOK SHENOY  
K.JOHN MATHAI (K/413/1984)  
JOSON MANAVALAN (J-526)  
KURYAN THOMAS (K/131/2003)  
PAULOSE C. ABRAHAM (MAH/58/2006)  
RAJA KANNAN (K/356/2008)  
POOJA MENON (K/971/2018)  
P.S.GIREESH  
ARJUN R NAIK  
THEJALAKSHMI R.S.  
AARON ZACHARIAS BENNY  
E.K.NANDAKUMAR (SR.) (N-23)

**OTHER PRESENT:**

SRI.B.UNNIKRISHNA KAIMAL-SR.GP

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON  
19.01.2024, THE COURT ON THE SAME DAY DELIVERED THE  
FOLLOWING:



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**ANU SIVARAMAN, J. & C. PRATHEEP KUMAR, J.**

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**W.A.No.691 of 2023**

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**Dated this the 19<sup>th</sup> day of January, 2024**

**JUDGMENT**

**Anu Sivaraman, J.**

1. This appeal is preferred against the judgment of the learned Single Judge refusing to consider the matter on merits on the ground that the writ petition is not maintainable against the 1<sup>st</sup> respondent therein, since the 1<sup>st</sup> respondent company is not State under Article 12 of the Constitution of India. A decision of a learned Single Judge of this Court in **K.J. Johnson v. Kerala Industrial and Technical Consultancy and others** [ILR 1992 (1) Kerala 808] was relied on by the learned Single Judge to hold that the writ petition is not maintainable. The judgments in W.P.(C).No.26071/2021 and W.P.(C)No.30515/2021 were also referred to.
2. We have heard Sri.Joseph Marcos, the learned Senior Counsel appearing for the appellant as instructed by Adv.Sri.Abraham



Joseph Markos, Sri.E.K.Nandakumar, the learned Senior Counsel appearing for the 1<sup>st</sup> respondent as instructed by Adv.Sri.Jai Mohan, Sri.B.Unnikrishna Kaimal, learned Senior Government Pleader, Sri.S.Manu, learned DSGI appearing for the 4<sup>th</sup> respondent and Sri.B.Ashok Shenoy, the learned counsel appearing for the additional respondent No.5. at considerable length.

3. The learned Senior Counsel appearing for the appellants drew our attention to the judgment in **K.J.Johnson's case** and contended that the share holding by the State of Kerala and the control exercised by the State were only considered in the said judgment. It is stated that the deep and pervasive control exercised by the State through its instrumentalities on the 1<sup>st</sup> respondent company was completely lost sight of. It is, therefore, contended that the said finding of the learned Single Judge requires a reconsideration. Though an appeal was taken against the judgment, the Division Bench did not answer the question whether the 1<sup>st</sup> respondent is State or not but proceeded by assuming that it is State for the purpose of Article 12 of the Constitution of India.



4. It is contended that the 1<sup>st</sup> respondent is a Public Sector Undertaking/ Government Company, which was established by the Industrial Development Bank of India (IDBI) and the Government of Kerala along with other Public sector banks/financial institutions/statutory corporations. Out of the total shareholding in the 1<sup>st</sup> respondent company, roughly 49% share are held by the 2<sup>nd</sup> respondent, which is a statutory corporation established under the Small Industries Development Bank of India Act, 1989. The remaining shares in the 1<sup>st</sup> respondent Company are held by the Government of Kerala and other statutory corporations and public sector banks in varying proportions. In essence, about 95 percent of shares in the 1<sup>st</sup> respondent are held by either Government or statutory Company and therefore the 1<sup>st</sup> respondent is a Government Company as defined under the provisions of the Companies Act, 2013. In view thereof, the 1<sup>st</sup> respondent Company is also listed as a Union Government Company on the portal of the Ministry of Corporate Affairs, as is evident from Exhibit P3(a) master data. As per Exhibit P3(b) GST



Registration certificate too, the 1<sup>st</sup> respondent is categorized as a Public Sector Undertaking. Furthermore, the accounts of the 1<sup>st</sup> respondent Company are annually audited by the Comptroller and Auditor General of India (CAG) as is evident from Exhibit P5 Audit report. The 1<sup>st</sup> respondent has also been recognised by the CAG as a deemed government company as may be seen from Exhibit P4. It is also pertinent to note that the 1<sup>st</sup> respondent has been recognised as an Accredited Government Agency by the 3<sup>rd</sup> respondent for the purpose of Public Works in the State, specifically General Civil Construction Works. Initially, in relation to such General Civil Construction Works, the 1<sup>st</sup> respondent used to be allotted work as Project Management Consultant on nomination basis. Presently, such public works are being allotted to the 1<sup>st</sup> respondent by way of tender from a pool of such similar accredited agencies, Its status as a public sector undertaking is admitted by the 1<sup>st</sup> respondent in Exhibits P6(b) and P6(c) communications. It is thus submitted that the 1<sup>st</sup> Respondent is amenable to writ jurisdiction under Article 226.



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5. Reliance is placed on Section 2(45) of the Companies Act, 2013 which defines a Government Company. Section 139(5) and 139(6) of the Act are also relied on. Section 617 and 619B of the Companies Act, 1956 with regard to deemed Government Companies are also referred to.

6. The Certificate of Incorporation of the company is produced as Ext.P3 along with the writ petition. The Ministry of Corporate Affairs, Government of India lists the 1<sup>st</sup> respondent company as the Union Government Company as evidenced by Ext.P3(a). Further, Ext.P3(b) GST Registration Certificate issued by the Government of India would show that the company is listed as a Public Sector Undertaking. Ext.P4 would show that the 1<sup>st</sup> respondent is listed by the Central Government as a deemed Government Company. The Annual Report of the KITCO is also produced and it is contended that the 1<sup>st</sup> respondent company is a consultant for the Government and other public sector undertakings and enjoys a monopoly where it participates in tenders for public works as a consultant. Ext.P6 order issued by the Additional Chief Secretary (Finance) is also relied on.





Ext.P7 would show that the State Chief Information Commissioner has required the 1<sup>st</sup> respondent to designate a State Assistant Public Information Officer and the State Public Information Officer as well as an appellate authority under the provisions of the RTI Act reckoning the 1<sup>st</sup> respondent as a public authority. It is further contended that the Articles of Association of the company, which is produced as Ext.P1 would clearly show that the administrative and financial control of the 1<sup>st</sup> respondent is with the Board of Directors, who are nominated by the share holder banks with the SIDBI nominated 1/3<sup>rd</sup> of the Directors, including the Chairman and the Managing Director. The remaining directors are nominated by the Government of Kerala and the Public Sector Banks. The Company is completely controlled by the share holder Government organisations and by extension, the respective Governments themselves. It is further stated that deep and perversive control over the affairs of the company by the instrumentality of the State which form the share holders is apparent from a reading of Exhibit P1. It is stated that Clause 180 and 181 of the Articles of Association reserves



the power of the SIDBI to give directions and of the Chairman to reserve important decisions for the approval of the SIDBI. It is, therefore, contended that the respondent company is clearly a State, since it is subject to deep and perversive State control in forming its policies as well as in all important respects and since it is treated as a Government company by the Government itself. It is submitted that all the tests which are formulated by the Apex Court in **Ajay Hasia Etc. vs Khalid Mujib Sehravardi & Ors.** [1981 AIR 487] are satisfied in the case of the company.

7. The learned counsel for the appellant places reliance on the decisions reported in **Northstone Builders and Developers Pvt. Ltd.v. KITCO** [W.P.(C).No.30515/2021], **Som Prakash Rekhi v. Union of India** [(1981) 1 SCC 449], **Binny Ltd & Ors.v.Sadasivan and others** [(2005) 6 SCC 657], **Anandi Mukta Sadguru S.M.V.S.S.J.M.S.Trust and others v. V.R.Rudani and others** [(1989) 2 SCC 691], **Grid Corporation and others v. Rasananda Das** [(2003) 10



SCC 297], **Ramana Dayaram Shetty v. International Airport Authority of India and others** [Civil Appeal No..895 of 1978] and **Sukhdev Singh and others v. Bhagat Ram and others** [AIR 1975 SC 1331] .

8. The learned counsel appearing for the respondent would, on the other hand, contend that the mere fact that the company has SIDBI, ICICI, Government of Kerala and Public Sector Banks as its share holders will not confer the status of the State on it. It is contended that the State control to be considered should be direct control either by the State Government or of the Central Government and any alleged control exercised over the affairs of the company by other instrumentalities of the State would not itself make the company a Central Government company amenable to writ jurisdiction under Article 12 of the Constitution of India.

9. The learned Senior counsel appearing for the 1<sup>st</sup> respondent places reliance on the decisions in **Chander Mohan Khanna V. National Council of Educational Research** [(1991) 4 SCC



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578], **Tekraj Vasandi V. Union of India & Others** [(1988) 1 SCC 236], **Pradeep Kumar Biswas V. Indian Institute of Chemical Biology & Others** [(2002) 5 SCC 111], **R.D.Shetty V. International Airport Authority of India & Others** [(1979)3 SCC 489], **Zee Telefilms Ltd, & Another V. Union of India & Others** [(2005) 4 SCC 649], **Rajbir Surjbhan Singh v.Chairman IBPS** [(2019) 14 SCC 189], **Ramakrishna Mission &Another Vs. Kago Kunya & Others** [(2019) 16 SCC 303], **Girish. G & Another V. State of Kerala and other connected cases** [2020 SCC Online Ker 1903], **Indian Institute of Management V. Ukakant Srivastava** [2001 SCC online Guj 61; (2002) 2471 GLH 330], **Shiny George Ambat V. Union of India** [2023 (4) KLT 365], **Chairman cum-M.D. ITI Limited V.K.Muniswamy & Others** [ JT 2023 (3) SC 42] **R.V. Dnyansagar v. Maharashtra Industrial and Technical Consultancy Organisation Limited** [2004 (2) SLR 213] **Hardicon Ltd v. Madan lal** [2015 SCC online Del 8063] and **K.J.Johnson V. Kerala Industrial and Technical Consultancy and others** [ILR (Kerala)(1992(1))].



10. The learned counsel appearing for the additional 5<sup>th</sup> respondent supports the contention of the appellant in this writ appeal. The learned counsel relies on the decision reported in **Asok Kumar Singh and others v. Bihar Industrial and Technical Consultancy Organisation Limited and others** [AIR 1998 Pat 9] It is contended that in almost identical circumstances, the High Court of Patna had considered the question whether the Bihar Industrial and Technical Consultancy Organisation Limited, which is registered under almost identical circumstances as the 1<sup>st</sup> respondent, is State or not and had held that a company, which is a subsidiary of a Government company is also a Government company within the meaning of Section 617 of the Indian Companies Act and since the BITCO was treated as an adjunct of Government in its Department of Industries, it is safe to assume it is State within the meaning of Article 12 of the Constitution of India. Reliance is also placed on the decision of the High Court of **Madhya Pradesh in Shanti Construction vs. Aavantuca Gas Ltd.** [AIR 2021 MP 183] where it is held that the fact that the Board of



Directors of the Company comprised of directors, who had been posted in the Board of the Company on deputation while holding their lien on substantive posts in respect of Government companies would show that Government control is exercised over the company in question. It was, therefore, held that such company would also be an instrumentality of the State and would answer the definition of State under Article 12 of the Constitution of India.

11. We have considered the contentions advanced. We have also given our anxious consideration to the judgments of the Apex Court and the various High Courts on the question of how the issue whether an authority is an instrumentality of the State under Article 12 of the Constitution of India is to be determined. We notice that in the case of entities in different states which are similar in nature to the 1<sup>st</sup> respondent herein, cases have arisen before the respective High Courts on the question whether such bodies are instrumentality of the State within the meaning of Article 12. In the case of **Asok Kumar Singh and others v. Bihar**



**Industrial and Technical Consultancy Organisation Limited and others**, the Patna High Court held that the BITCO is an instrumentality of the State, while the Bombay High Court in **R.V Dnyansagar v. Maharashtra Industrial and Technical Consultancy Organisation Limited** has held that the Maharashtra equivalent of the 1<sup>st</sup> respondent is not an instrumentality of the State. We notice that in **R.V Dnyansagar** (supra) the Bombay High Court held at Paragraph 14 as follows:-

“As regards the respondent company nothing is produced by the petitioner indicating formation of the respondent company, its objects and functions and management and control which may lead us to hold that respondent company is a State within the meaning of Article 12. The primary burden was on the petitioner to produce material to establish that the respondent company was a State within the meaning of Article 12 of the Constitution of India, which he has failed to discharge.”

However, in **Asok Kumar Singh and others v. Bihar Industrial and Technical Consultancy Organisation Limited and others**, the Patna High Court held that the BITCO can be said to be subsidiary company of the IDBI and would, therefore, also be a Government company within



the meaning of Section 617 of the Companies Act. There also, the IDBI had 49.25% of the shares of the BITCO and the Articles of Association had specific provisions as to the nomination of 1/3<sup>rd</sup> of total number of Directors and the power to issue directives in regard to conduct of business of the company. The BITCO was also regarded as one of the organisations notified under the Rules of Executive Business of the State of Bihar. All these were cumulatively taken into account by the Patna High Court to decide that the BITCO was an instrumentality of the State under Article 12 of the Constitution of India.

12. We, therefore, deem it necessary to consider the contentions and the materials on record with regard to the 1<sup>st</sup> respondent. We notice that the Memorandum and Articles of Association of the 1<sup>st</sup> respondent company would make it clear that it is a company incorporated with public entities, including the SIDBI, IFCI, ICICI Public Sector Banks and Government of Kerala as its share holders. There is, admittedly, no private share holding in the company. The





company is recognised as a public sector enterprise by the Central Government and the Government of Kerala and is listed as a Central Government company. Admittedly, the affairs of the company are being run under the directions and supervision of its share holders, who are admittedly public sector undertakings. The Government of Kerala habitually nominates two of the Directors of the Company. The provisions of the Memorandum and Articles of Association would make it clear that the SIDBI has a decisive opinion in all matters of policy of the company.

13.It is submitted that in the judgment of the learned single Judge in **K.J.Johnson**, it was stated that the Government of Kerala has only 3% share in the 1<sup>st</sup> respondent. It was further stated that the accounts of the company do not require scrutiny and satisfaction of the Government and auditing is not done by State agency. It was further held that merely because nationalised banks have contributed to the share capital of the respondent, it does not become an authority as provided under Article 12 of the Constitution of India and that the



memorandum and articles of association do not show any substantial control over the company by the Government. Further it was held at paragraph 11 of the judgment as follows:-

“11. Respondent company is a public limited company registered under the Companies Act and its shares are held by Industrial Development Bank of India, Industrial Finance Corporation of India, Industrial Credit and Investment Corporation of India, Kerala State Industrial Development Corporation, Government of Kerala and various nationalised banks. It is governed by the Board of Directors, members of which are to be nominated by the shareholders. Industrial Development Bank of India being the holder of major shares has the right to appoint five directors including the Chairman and the Managing Director. The control of the company is vested with the Board of Directors as per Art.141 of the Memorandum and Articles of Association of the Company. The object of the respondent company is to serve the needs of small scale and medium scale industries in the State viz., to provide quality consultancy services at reasonable cost. It is run on commercial lines. Expenses are met from the income received for its services. These features sufficiently clearly show that the respondent is not an instrumentality of the State or authority under Art.12 of the Constitution.”



14. Having considered the contentions advanced on either side and having gone through the decisions which have been placed before us, we are unable to agree with the finding in **K.J. Johnson** that the KITCO is not an instrumentality of the State and would therefore not be amenable to writ jurisdiction. We notice that the large majority of shares of the 1<sup>st</sup> respondent are held by admitted instrumentalities of the Central Government. Though the State Government has only 3% share in the 1<sup>st</sup> respondent, it has a decisive representation in the Board by sending two directors out of twelve. Further, the policy decisions of the 1<sup>st</sup> respondent are controlled by the SIDBI which nominates 1/3<sup>rd</sup> of the Directors including the Chairman and the Managing Director. It is clear from a reading of the Articles of Association and the documents produced in the writ petition and in this writ appeal that the State and Central Governments themselves specifically consider the 1<sup>st</sup> respondent as a Central Government company. It is also discernible that the accounts of the 1<sup>st</sup> respondent are audited by the Comptroller and Auditor General of India



treating it as a deemed Government company. It is recognised as an accredited Government agency for the purpose of public works in the State.

15. In the above view of the matter, we are of the opinion that the finding that the respondent company is not a State under Article 12 of the Constitution of India and that the writ petition is not maintainable is not correct position in law. We hold that the respondent company is an instrumentality of the Union of India under Article 12 of the Constitution of India and is, therefore, amenable to writ jurisdiction.

The judgment under appeal is set aside. The writ petition shall be placed before the learned single Judge for consideration on merits. Writ Appeal is ordered accordingly.

sd/-

**Anu Sivaraman, Judge**

sd/-

**C. Pratheep Kumar, Judge**



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**APPENDIX OF WA 691/2023**

## RESPONDENT ANNEXURES

- Annexure R1(A) A copy of the share holding pattern of the 1st respondent, as on 31.03.2023
- Annexure R1(B(a)) A true copy of another similar order dated 26.07.2022
- Annexure R1(B) A true copy of the Order dated 02.06.2022 in CP NO. 829(4)/21/S.I.C. issued by the State Information Commissioner
- Annexure R1(C) A copy of the screenshot of the email dated 28.09.2021 circulated to all employees containing the updated KITCO Staff Rules.

## PETITIONER ANNEXURES

- Annexure A True copy of order dated 21.11.2001 of the Government of Kerala regarding deputation of a government employee from harbour Engineering Department
- Annexure B True copy of letter dated 05.04.1994 sent by the Director of Industries and Commerce
- Annexure C True copy of the letter dated 12.04.1994 issued by the Managing Director of the 1st Respondent
- Annexure D True copy of the proceedings of the first meeting of the members of KIED dated 29.04.1994
- Annexure E True copy of the Government Order dated 12.8.1994



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- Annexure F True copy of the Management Contract between KIED and the 1st Respondent dated 14.12.1994
- Annexure G A true copy of the contract between KIED and the 1st Respondent dated 30.05.2003
- Annexure H A true copy of letter dated 15.03.1994 from the Secretary to Government of Kerala regarding the State grant towards KIED
- Annexure I True copy of a computation sheet prepared the Petitioner demonstrating the total funds received by the 1st Respondent organization from various government departments from 2013 to 2023
- Annexure J True Copy of the Circular No. 33/2014 dated 31.07.2014 issued by the Ministry of Corporate Affairs
- Annexure K True copy of the relevant pages of the CAG Audit conducted under Section 619 of the Companies Act for the year 1979-80