
(1998) 07 CAL CK 0009
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction Original Side W.P. No. 155 of 1998

Ajit Kumar Barat

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 24-07-1998

Acts Referred:

Constitution of India, 1950 — Article 226

Industrial Disputes Act, 1947 — Section 10(1), 12(4), 12(5), 2

Citation : (1998) 2 CALLT 533 : (1998) 2 CHN 113

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Judgement

1. The Court : The challenge in this writ application is by an erstwhile employee of the respondent Indian Tea Association (ITA) to the refusal of the State Government to refer a dispute for adjudication u/s 12(5) of the Industrial Disputes Act, 1947 (referred to as the Act).

2. The background to the dispute is briefly narrated. The writ petitioner had been transferred by the ITA. The petitioner filed a suit in the City Civil Court at Calcutta challenging the order of transfer. An interim order was passed by the trial court staying the transfer order. ITA preferred on appeal to the High Court (FMAT No. 3116 of 1995). The High Court in turn, stayed the order of the trial court on 27.9.95. The petitioner's SLP to the Supreme Court challenging the order dated 27.9.95 was dismissed. The suit is pending.

3. ITA Issued a termination letter 27.11. 95 dismissing the petitioner from service. The petitioner filed a second suit in the City Civil Court challenging the dismissal and asking for damages and compensation. Thereafter the appeal being FMAT No. 3116 of 1995 was renumbered as FMAT No. 90 of 1996/5 and disposed of by the High Court directing both the suits to be heard and disposed of by the City Civil Court. After this the petitioner raised the dispute before the Conciliation Officer in respect of his termination and withdrew the suit challenging the order of dismissal pending the conciliation proceeding.

4. Statements and documents were filed by both the parties before the Conciliation Officer. The stand of ITA before the Conciliation Officer was that the petitioner was not a workman at all.

5. The Conciliation Officer filed a report with the State Government. He noted that the ITA had insisted that the petitioner was not a workman and that no cognizance could be taken of the disputes raised by him. However, on the basis of the order passed by the Division Bench of this court on 27.9.95 in which, according to the Conciliation Officer and the petitioner, it was held that the petitioner was a workman, the Conciliation Officer concluded that the petitioner was a workman. In his report u/s 12(5) he said :

"In view of the aforesaid finding of the Hon"ble High Court and rival contentions of the parties that as no settlement between the parties could be arrived at, it is felt that a judicial review over the matter may be obtained. Shri Barat also wants it. It is, therefore, recommended that the following issues may be referred to an Industrial Tribunal/Labour Court for adjudication.

ISSUES

Whether the dismissal of Shri Ajit Kumar Barat from his (service) is Justified ?

To what relief. If any, he is entitled ?"

6. In refusing to make the reference the State Government formed the opinion that there was in fact no industrial dispute because the writ petitioner was not a workman. In arriving at this decision as communicated to the petitioner the Government said :

"After examination. It reveals that you were first appointed as Assistant Secretary in the Indian Tea Association and subsequently promoted to the post of Joint Secretary. Besides the Basic Pay, you were given child Allowance, House Rent, Subsidy, Furnishing Allowance, House maintenance Allowance, Transport subsidy, Re-imbursement of Fuel and Electricity Charges, Entertainment Expenses, Re-imbursement of Servant's Wages, Monthly Club Subscription, Leave Travel Allowance and Reimbursement of Hospitality Expenses. Your duties also included power of sanction of expenses on behalf of I.T.A.

So your pay and perquisites and the status enjoyed by you in the Organisation and also the power of sanction of expenses suggest that you were a part of the Management Hence you cannot be treated as a "Workman" within the purview of the Industrial Disputes Act.

Government, therefore, regrets its inability to refer your dispute to any Industrial Tribunal/Court u/s 12(5) of the I.D. Act, 1947."

7. The submission of the writ petitioner is that he is in fact a workman within the meaning of the 1947 Act and that the opinion of the Government as communicated to him was wrong. He said that the State Government has gone into the merits of the dispute and adjudicated on the matter. It is further

contended that the State Government had taken into consideration extraneous matters and not considered relevant matters. Finally, it is submitted that the question whether the petitioner is a workman or not requires detailed examination which could be satisfactorily decided only by way of adjudication by a Tribunal. Several decisions have been cited by the petitioner in support of the submission which will be considered subsequently,

8. The respondents on the other hand have submitted that there were sufficient materials before the State Government to come to the conclusion that the petitioner was not a workman. It has denied that there was any extraneous consideration and that the court in exercise of its discretionary powers under Article 226 should not interfere with the opinion of the State Government

9. The power of reference of disputes to adjudication by the Appropriate Government to a Labour Court, Tribunal or National Tribunal is conferred by section 10(1) of the Act

10. The relevant extract of section 10(1) is set out herein below :

"10. Reference of disputes to Boards, Courts or Tribunals.--(1) Where the appropriate Government is of opinion that any Industrial dispute exists or is apprehended, it may at any time, by order in writing,--

(a) * * * * * (b) * * * * * (c) refer the dispute or any matter appearing to be connected with, or relevant to, the dispute, if it relates to any matter specified in the Second Schedule to a Labour Court for adjudication : or

(d) refer the dispute or any matter appearing to be connected with, or relevant to the dispute, whether it relates to any matter specified in the Second Schedule or the Third Schedule, to a Tribunal for adjudication."

11. On a strict interpretation of section 10(1) it is clear that it is the opinion of the appropriate Government which alone is the foundation of an order of reference of section 10(1) and unless the appropriate Government is of the opinion that an Industrial dispute exists or is apprehended it has no power to make any reference to adjudicate [See : State of Madras Vs. C.P. Sarathy and Another,

12. An Industrial has been defined in section 2(k) of the Act as meaning any dispute or difference between (i) employers and employers, or (ii) between employers and workmen, or (iii) between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person. Therefore unless there is a dispute with a workman in cases (ii) and (iii) above, there can be no industrial dispute. A finding that the employee is not a workman is a Jurisdictional fact, and could under the decisions earlier noted, be Judicially review according to the well established norms pertaining to the subjective satisfaction/opinion of the State.

13. Thus in State of Madras Vs. C.P. Sarathy and Another, it was said :

"It must be remembered that in making a reference u/s 10(1) the Government is doing an administrative act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as it was a judicial or quasi-Judicial determination."

14. Therefore in *Prem Kakar v. State of Haryana* : AIR 1978 SC 1474 when the Government had refused to make an order of reference on the ground that the employee's case was not covered by the definition of the term "workman" under the Industrial Disputes Act, the Supreme Court rejected the submission of the employee that the question whether he was a workman or not was a disputed question of fact and law which could be decided only by an Appropriate Labour Court.

15. Again in *Avon Services Production Agencies (P) Ltd. Vs. Industrial Tribunal, Haryana and Others*, the Supreme Court said with regard to the scope of Judicial review of an opinion formed u/s 10(1).

"There must be some material before the Government on the basis of which it forms an opinion that an Industrial dispute exists or is apprehended"

"The adequacy or sufficiency of the material on which the opinion was formed is beyond the pale of Judicial security."

"[The] Court may not Issue writ of mandamus, directing the Government to make a reference but the court can after examining the reasons given by the appropriate Government for refusing to make a reference come to a conclusion that they are Irrelevant, extraneous or not germane to the determination and then can direct the Government to reconsider the matter. The legal position appears to be beyond the pale of controversy."

(See *Ram Avatar Sharma v. State of Haryana* : 1995 3 SCR 686

16. It would follow that as the precondition of a reference u/s 10(1) is the opinion of the Government that opinion cannot be substituted by the opinion of any Court or Tribunal but could only be judicially reviewed. Of course the opinion would not be binding on the parties in the sense that it may be challenged in appropriate proceedings. If the opinion is that the employee is a workman and a reference is made to a Labour Court or Industrial Tribunal etc. It would be open to the employer to raise the Issue that there was no Industrial dispute at all because the employee was not a workman before the Tribunal. Where there is no such reference before the Tribunal because the appropriate Government is of the opinion that there is no Industrial dispute, the court cannot strictly in terms of section 10(1) direct the reference of the dispute to the Tribunal but it can compel the State Government to exercise its powers according to law i.e. by considering relevant materials and Ignoring extraneous matters as held in *Ram Avatar*

Sharma v. State of Haryana (Ibid). Conversely, if the Government duty formed an opinion that no Industrial dispute exists on relevant material, the court could not interfere.

17. Section 12 on the other hand is part of the object of the Act to resolve Industrial disputes expeditiously! and if possible without resorting to a lengthy adjudication. Sub-sections (1) to (4) of section 12 deal with the duties of Conciliation Officers to attempt to bring about a settlement between the parties where an Industrial dispute exists or is apprehended. If no such settlement is arrived at, a full report setting out inter alia the facts and circumstances relating to the dispute and the steps taken by the Conciliation Officer for bringing about a settlement thereof together with a full statement of such facts and circumstances, and the reasons on account of which, in his opinion, a settlement could not be arrived at is required to be sent to Appropriate Government in the form of a report to the appropriate Government

18. Section 12(5) of the Act provides :

"12. Duties of conciliation officers.--(1) x x x x x X

(5) If, on a consideration of the report referred in sub-section (4), the appropriate Government is satisfied that there is a case for reference to a Board, Labour Court, Tribunal or National Tribunal, it may make such reference. Where the appropriate Government does not make such a reference it shall record and communicate to the parties concerned its reasons therefore"

19. In other words, the Appropriate Government must (a) consider the report; and (b) be satisfied that there is a case for reference before it makes the reference. However even after considering the conciliation Officer's report u/s 12(5), unless the State Government forms the requisite opinion that there is an Industrial dispute it cannot pass any order u/s 10(1).

20. Section 12(5) deals with a situation where an Industrial dispute exists. It does not cover the same filed as section 10(1) where the very existence of the Industrial dispute is to be determined.

21. The State Government has been empowered to refuse to make a reference u/s 12(5) even if an Industrial dispute exists or is apprehended [See ; Bombay Union of Journalists and Others Vs. The State of Bombay and Another, The case of Bombay Union of Journalists v. State of Bombay : Bombay Union of Journalists and Others Vs. The State of Bombay and Another, was on the discretionary power of the State Government u/s 12(5). It was held that even if the Government formed the opinion that there was an Industrial dispute it could still refuse a reference u/s 12(5) in its discretion considering the prima facie merits of the dispute. The dispute referred to is not the dispute as to the existence of the Industrial dispute but the merits of an existing Industrial dispute. For example, the Government may refuse to refer the Industrial dispute if the claim made is patently frivolous or clearly belated. But no adjudication of the Industrial dispute

Itself could be made by the Government (ibid). But in such cases the normal rule is that a reference should be made unless there are exceptional reasons not to do so [See : Shauji Wallace & Co. v. State of Tamilnadu : (1987) 1 LLJ 177 (Mad DB)].

22. There is thus a statutory distinction between the opinion of the appropriate Government as to the existence of the jurisdictional facts u/s 10(1) and the discretion not to refer despite having the Jurisdiction to do so u/s 12(5).

23. This distinction between the court's power to judicially review the subjective opinion of the appropriate Government u/s 10(1) on the one hand and the exercise of its discretionary power u/s 12(5) on the other, was virtually erased by the Supreme Court in several decisions delivered after this.

24. In S.K. Verma Vs. Mahesh Chandra and Another, the Supreme Court did not approach the formation of the opinion of the Government u/s 10(1) by merely seeing whether there was relevant material to support the opinion. It delved into the material itself and came to the conclusion that the employee was a workman within the meaning of the Act.

25. That the statutory distinction had become blurred if not wholly obliterated is clear from Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others, . In that case the State Government refused to make a reference on the ground that the casual drivers who had claimed permanent employment with TELCO, were not TELCO's workmen at all. The drivers challenged such refusal. In upholding the drivers' challenge the Supreme Court said :

"It is, however, submitted on behalf of TELCO that unless there is relationship of employer and employee or in other words, unless those who are raising the disputes are workmen, there cannot be any existence of Industrial dispute within the meaning of the terms as defined in section 2(k) of the Act. It is urged that an order to form an opinion as to whether an Industrial dispute exists or is apprehended one of the factors that has to be considered by the Government is whether the persons who are raising the disputes are workmen or not within the meaning of the definition as contained in section 2(k) of the Act.

13. Attractive though the contention is, we regret, we are unable to accept the same. It is now well settled that, while exercising power u/s 10(1) of the Act. the function of the appropriate Government is an administrative function and not a judicial or quasi judicial function, and that in performing this administrative function the Government cannot delve into the merits of the dispute and take upon itself the determination of the Us, which would certainly be in excess of the powers conferred on it by section 10 of the Act. See Ram Avtar Sharma and Others Vs. State of Haryana and Another, ; M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another, ; Shambu Nath Goyal Vs. Bank of Baroda,

14. Applying the principle laid down by this court in the above decisions, there can be no doubt that the Government was not Justified in deciding the dispute.

Where, as in the Instant case, the dispute is whether the persons raising the dispute are workmen or not, the same cannot be decided by the Government in exercise of its administrative function u/s 10(1) of the Act."

26. In *Abad Dairy Dudh Vitran Kendra Sanchalak Mandal Vs. Abad Dairy and Others*,

"The High Court examined the matter and came to the conclusion that the members of the appellant association were not "workmen" within the meaning of the Industrial Disputes Act. So it dismissed the writ petitions, leaving the appellants to take recourse to ordinary civil courts to ventilate their grievances, if so advised.

We however think that the High Court should not have done this but, instead, should have directed the Government to refer the disputes between the parties to an Industrial Tribunal, making the Issue of the Jurisdictional fact viz., as to "whether the appellants workmen?"

27. If the matter were *res Integra*, I would have held that if section 10(1) were not to be rendered otiose, the court should limit its powers of judicial review to those prescribed in *Ram Avatar Sharma v. State of Haryana* quoted above. But in view of the subsequent decisions of the Supreme Court I have no alternative but to allow the writ application. The reference by the parties to the material before the Government cannot be gone into by this court Nor is the court called upon to decide whether the State Government's opinion that the workman within the meaning of section 2(s) of the Act is based on relevant material or not. The court, according to the last three decisions cited. Is only to see whether there was a dispute before the Government which the Government has decided finally. There can be no gainsaying that this is so.

28. For the reasons stated the writ application is allowed. Let a writ of mandamus Issue in terms of prayer (a). The State Government's Impugned order is set aside. The State Government is directed to refer the Issue as to whether the petitioner is a workman to the Tribunal for adjudication. There will be no order as to costs.

29. Petition allowed