
(1999) 03 CAL CK 0018

In the Calcutta High Court

Case No : A.P.O. No. 510 of 1998 and W.P. No. 155 of 1998

Secretary, Indian Tea Association

APPELLANT

Vs

Ajit Kumar Barat and Others

RESPONDENT

Date of Decision : 17-03-1999

Acts Referred:

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

Citation : (1999) 2 LLJ 166

Hon'ble Judges : Satyabrata Sinha, J;S.N. Bhattacharjee, J

Bench : Division Bench

Advocate : A. Choudhury and Tarun K. Roy, for State, for the Appellant;

Final Decision : Allowed

Judgement

Satyabrata Sinha, J.—This appeal is directed against a judgment and order dated July 24, 1998 passed by a learned Single Judge of this Court whereby and whereunder the writ petition filed by the writ petitioner was allowed. The basic fact of the matter is not in dispute.

2. The petitioner was appointed as a Joint Secretary, Legal, of Indian Tea Association. According to the petitioner the duties to be performed by the Assistant Secretary in which post he as appointed would appear from the advertisement which is to the following effect:

"Duties would include minuting of meetings; formulating advice on important judicial decisions and legislative enactments; preparing memoranda/representations."

3. The petitioner, therefore, contended that he having no power to issue any direction or exercise supervisory power or not having control over the other workmen of the appellant herein, he was a "workman" within the meaning of Section 12(5) of the Industrial Disputes Act. Admittedly, owing to an alleged misconduct committed by the appellant herein he was dismissed from service. He raised an Industrial dispute purported to be u/s 2-A of the said Act. The matter

was considered by the Conciliation Officer in terms of Section 12 of the said Act. As the dispute between parties could not be resolved at that stage a failure report was submitted by the conciliation Officer on or about July 2, 1997. A bare perusal of the said failure report would show that a contention had been raised therein as to whether the writ petitioner was a workman or not. The Conciliation Officer upon considering the relevant documents as also upon taking into consideration a decision of a learned single Judge of this Court and further upon taking into consideration the nature of duties allegedly performed by the writ petitioner inter alia held that the said question requires a decision by a Tribunal by making a reference in terms of the provisions of the Industrial Disputes Act. In the said report it was stated as follows:-

"In view of the aforesaid finding of the Hon'ble High Court and rival contentions of the parties and 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.

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

To what relief, if any, is he entitled?"

4. As despite submission of such failure report the Appropriate Government did not pass any order, the petitioner filed a writ application which was marked as W.P. No. 22878 (W) of 1997 wherein a direction was issued by this Court to consider the matter and pass an appropriate order. Pursuant to the said directions the State of West Bengal being the Appropriate Government by a letter dated January 14, 1998 addressed to the petitioner communicated as under:

"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 Basis Pay, you were given Child Allowance, House Rent Subsidy, Furnishing Allowance, House Maintenance Allowance, Transport Subsidy, Reimbursement of Fuel and Electricity Charges, Entertainment Expenses, Re-imbursement of Servant's Wages, Monthly Club Subscription, Leave Travel Allowance and Re-imbursement 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."

Being aggrieved by and dissatisfied with the said order the petitioner filed the instant writ application. In the said writ petition inter alia it was contended that the authorities of the appellant are influential persons and had obtained the

aforementioned order by exercising their influence upon the Labour Secretary, although there were no materials before the Appropriate Government to arrive at the said finding.

5. Before the Learned Trial Judge the respondent Nos. 1 to 4 did not file any affidavit-in-opposition nor produced the records. An affidavit-in-opposition had been filed by the Appellant herein wherein inter alia it was contended that the said order dated January 14, 1998 was passed by the Appropriate Government upon taking into consideration all relevant materials. The learned Trial Judge by reason of the judgment under appeal inter alia held that the Appropriate Government was bound to make the reference as in refusing to do so it was usurping the adjudicatory function. A direction was made to make a reference in terms of Section 10(1) of the said Act and it further directed the State Government to refer the issue as to whether the petitioner was workman. Although the instant appeal has been filed against the said judgment by the appellant/respondent but with regard to the third decision of the learned Trial Judge a cross objection has been filed by the writ petitioner.

6. Mr. Choudhury learned Counsel for the respondents has raised three questions in support of this application. The learned Counsel firstly submitted that a bare perusal of the judgment under appeal would clearly reveal that the learned Trial Judge proceeded on a misconception that although the Court was inclined to agree with the contention that the Appropriate Government in terms of Section 10(1) of the said Act has the requisite jurisdiction to form an opinion as regards the existence of an industrial dispute or an apprehended dispute but in refusing to make a reference, the Appropriate Government has usurped an adjudicatory role. According to Mr. Choudhury in view of several decisions of the Apex Court in *State of Madras Vs. C.P. Sarathy and Another*, *Prem Kakar Vs. State of Haryana and Another*, *Bombay Union of Journalists and Others Vs. The State of Bombay and Another*, and *Avon Services Production Agencies (P) Ltd. Vs. Industrial Tribunal, Haryana and Others*, there cannot be any doubt whatsoever that the Appropriate Government had the requisite jurisdiction to arrive at a conclusion as to whether an industrial dispute exists is apprehended or not. Such a power, contends Mr. Choudhury, being an administrative one and discretionary in nature, the High Court in exercise of its power of judicial review should not interfere until and unless it arrives at a definite conclusion that the said order is vitiated by any illegality, irrationality or procedural illegality. Mr. Choudhury further contends that the subsequent decision of the Apex Court in *Telco Convoy Drivers Mazdoor Sangh and Another Vs. State of Bihar and Others*, having been rendered by a Division Bench and having not noticed the judgment of the Constitution Bench in *State of Madras (supra)* must be held to have been rendered per incuriam and in any event thereby the law itself cannot be said to have been changed as has been observed by the learned Trial Judge. Mr. Choudhury strenuously submitted that the said decision must be read on the fact situation obtaining therein inasmuch as the question which was raised by the workman was as to whether they are entitled to the same scale of pay as was being paid by the Telco

Engineering and Locomotive Works Ltd. to their own drivers. This, contends Mr. Choudhury, would indirectly raise a question as to whether the convoy drivers were the workmen under the TELCO or not. So far as the decision of the Apex Court in *Abad Dairy Dudh Vekreta Kendra Sanchalak Mondal v. Abad Dairy and Ors.* reported in (1993 III LLJ 885) is concerned the learned counsel contends, that the said decision was rendered on its own fact as therein the High Court entered into the merit of the matter which was not within its domain. The learned Counsel further submitted that in any event the learned Trial Judge erred in law in issuing a writ of mandamus directing the State to make a reference.

7. Mr. Barat, who appeared in person ably argued his case. Mr. Barat submitted that upon coming into force of Section 2-A of the Industrial Disputes Act with effect from December 1, 1965, the question as regards formation of any opinion by the appropriate Government in terms of Section 10(1) read with Section 12(5) of the said Act had lost all its efficacy inasmuch as once a dispute is raised in terms of Section 2-A of the said Act the appropriate Government will have no other option but to refer the industrial dispute to an appropriate Tribunal. Reference in this connection has been made to Rule 12-A of the West Bengal Industrial Disputes Rules. It was submitted that the appropriate Government while considering the question as to whether an industrial dispute should or should not be referred to an industrial Tribunal in exercise of its power u/s 10(1) of the Industrial Disputes Act cannot enter into a disputed question of fact or law. Such a disputed question of fact or law, contends Mr. Barat, having been gone into by the Conciliation Officer and the said Officer having found that a case has been made out for the appropriate Government to exercise its power u/s 10(1), it could not have refused to do so as the only material before it was the said report. Mr. Barat in support of his aforementioned contention has relied upon *Nirmal Singh Vs. State of Punjab and Others*, *M.P. Irrigation Karamchari Sangh Vs. State of M.P. and Another*, *Ram Avtar Sharma and Others Vs. State of Haryana and Another*, *Mihir Kumar Hazra Chowdhury Vs. Union of India (UOI) and Others*, and *V. Veerarajan and others Vs. Government of Tamil Nadu and others*, Referring to a decision of the Division Bench of Bombay High Court in *Rohinton P. Daruwalla Vs. Deputy Commissioner of Labour (Conciliation) and Others*, Mr. Barat submitted that a distinction exists between the reasons and decisions. The decision, according to Mr. Barat, must be dependent upon the relevant facts of the case and effect thereof must be felt from the order itself. According to Mr. Barat from the decisions referred to herein before it would appear that in appropriate cases "High Courts or the Supreme Court in exercise of the power of Judicial review issued a writ of mandamus directing the appropriate Government to make a reference and thus no illegality has been committed by the learned Trial Judge in issuing such a direction. As regards the question directed to be referred by the learned Trial Judge Mr. Barat pressed his cross objection and submitted that the only direction which could be issued by this Court was to refer the dispute as regards the Validity or otherwise of the order of termination passed by the Appellant herein against him.

8. A. Before proceeding to consider the rival contentions, as noticed therein before, it would be profitable to decide the question as to whether the question raised by Mr. Barat to the effect upon coming into force of the provisions of Section 2-A of the said Act the power of the appropriate Government as regards the formation of opinion has become redundant is correct or not. Reliance placed by Mr. Barat in support of his aforementioned contentions in *Shaw Wallace & Co. Ltd v. State of Tamil Nadu* represented by Commissioner and Secretary Labour Deptt. and Ors. in our considered view, does not lay down the proposition in absolute term that whenever a dispute is raised in terms of Section 2-A of the said Act the appropriate Government has no other option but to exercise its power to make a reference. In fact by reason of provisions of Section 2-A of the said Act only a legal fiction has been created to the effect that where an order of discharge, dismissal, retrenchment or otherwise termination of services has been passed by an employer against workman or a dispute raised in relation thereto shall be an industrial dispute. The historical background of industrial jurisprudence leading to enactment of the Industrial Disputes (Amendment) Act, 1965 leaves no manner of doubt that prior to the provisions of Section 2-A of the said Act coming into force, an industrial dispute was required to be raised in the manner laid down therein and as an individual person aggrieved could not directly take recourse to the provisions of the said Act so as to enable the appropriate Government to make a reference, an exception has been made by reason of the said provisions to the effect that any order of discharge, dismissal, retrenchment or otherwise termination of service of a workman by an employer shall be an industrial dispute within the meaning of Section 2(k) of the said Act but by reason thereof the power of the appropriate Government to make a reference u/s 10(1) read with Section 12(5) of the Act had not been taken away. Further more in terms of Section 2-A of the said Act, what can be referred to is an industrial dispute which would in turn include a dispute between the workman and the management, the logical corollary whereof would be that a reference can be made only in a case where the industrial dispute so raised concerns a workman and not otherwise and thus only because an order of discharge, dismissal, retrenchment or termination of services had been passed by the management, the appropriate Government was not supposed to make any reference without application of its mind as to whether the concerned person is a "workman" within the meaning of the provision of the Industrial Disputes Act. There, thus, cannot be any manner of doubt that even such a reference has to be made by the appropriate Government u/s 10(1) of the said Act. However, it is not a well settled principle of law that the jurisdiction of the appropriate Government in terms of Section 10(1) of the said Act is a limited one. It is correct that in Section 10(1) of the Act the terminology "is of opinion" has been used. There cannot further be any doubt that in terms of the aforementioned provision a satisfaction has to be arrived at by the appropriate Government as regards the fact as to whether an Industrial Dispute exists or is apprehended, but it is also equally true that such formation of opinion or satisfaction must be based on objective criteria. No discretion as is well known is beyond the pale of

judicial review. Discretion as is well settled must be exercised fairly and reasonably and cannot be based on whims or caprice. Such discretion has to be exercised within the four corners of the power by the Statutory Authority. This aspect of the matter has been considered by this Court in *Chaitnya Charan Das Vs. State of West Bengal and others*, . It is also a well settled principle of law that even in a case of subjective satisfaction a judicial review is permissible in view of various decisions of the Apex Court *The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others*, *In State of Madras v. C.R. Sarathi* (supra) the Apex Court was considering the question as to whether a preliminary objection raised before a Magistrate where a charge sheet had been filed by the appellant against the first respondent for alleged commission of an offence u/s 29 of the Industrial Disputes Act was ultra vires or not. While considering the aforementioned question the Apex Court incidentally referred to the provisions of Section 10(1) of the said Act so as to judge the correctness or otherwise of the said contention. It was held that if the dispute was an industrial dispute as defined in the Act, its factual existence of making a reference of a particular case are matters entirely for the Government to decide upon. It would not be competent for the Court to hold a reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no materials before the Government on which it could have come to an affirmative conclusion on those matters. In that case a reference had been made. It was however observed that the Government must, of course, have sufficient knowledge of the nature of the dispute and must arrive at the satisfaction about the existence of an industrial dispute within the meaning of the Act as for instance that it relates to retrenchment or reinstatement. But, beyond this no obligation can be held to lie on the Government to ascertain particularly of the dispute before making a reference u/s 10(1) of the said Act but should specify the same in the order.

9. Thus formation of an opinion by the Appropriate Government is basically confined to the fact as to whether an industrial dispute exists or is apprehended.

In *Bombay Union of Journalists and Ors. v. State of Bombay* (supra) the Apex Court while observing that the Government is not precluded from considering the prima facie facts as regards existence or apprehension of an industrial dispute clearly observed that if the claim made is patently frivolous or is clearly belated, the appropriate Government may refuse to make a reference. Likewise, if the impact of the claim on the general relation between the employer and the employees in the region is likely to be adverse the Appropriate Government may take that into account in deciding whether a reference should be made or not. Upon considering the provisions of Section 10 and Section 12 of the said Act the Apex Court held that the Appropriate Government need not write elaborate order indicating exhaustively all the reasons that weighed in its mind in refusing to make a reference but proceeded to observe that it is no doubt desirable that the party concerned should be told clearly and precisely the reasons why no reference is made because the object of Section 12(5) appears to be to require

the appropriate Government to state its reasons for refusing to make a reference so that the reasons should stand public scrutiny.

In *Prem Kumar v. State of Haryana and Anr.* (supra) no reason had been assigned. It was held that the order u/s 10(1) read with Section 12(5) of the Act is an administrative order and not a judicial or quasi Judicial order.

In *Avon Services (Production Agencies) Pvt. Ltd. v. Industrial Tribunal, Faridabad and Ors.* (supra) the Apex Court again held that an order u/s 10(1) read with Section 12 is an administrative order. The appropriate Government is entitled to change its opinion and despite refusal to make reference once, it can refer the dispute to the Tribunal again. The other decisions cited by Mr. Choudhury in our opinion are not relevant.

10. The conspectus of the aforementioned decisions clearly points out that when the Appropriate Government exercise its jurisdiction u/s 10(1) read with Section 12(5) of the Act it merely exercise an administrative power. It has a limited role to play and it cannot usurp any adjudicatory role. Only a quasi judicial authority can usurp an adjudicatory function. This proposition of law is not disputed.

11. The question as to whether the writ petitioner/respondent was workman within the meaning of Section 2(s) of the said Act or not was no doubt a question which could have fallen for consideration before the Appropriate Government but the failure report submitted by the Conciliation Officer as referred to herein before clearly shows that the said question required adjudication. It is a matter of great regret that the State Government not only failed and/or neglected to file an affidavit- in-opposition justifying its action but also failed to produce records before this Court. In fact the Appeal Court directed the respondent to produce the records at the time of hearing. Despite such clear directions the State did not comply therewith.

Mr. Choudhury had made an attempt to refer to certain documents and particularly a letter dated August 5, 1996 addressed by the appellant herein to the Deputy Labour Commissioner wherein, the nature of duties allegedly performed by the petitioner had been stated.

Mr. Choudhury, therefore, urged that the Appropriate Government must be presumed to have before it the aforementioned materials. We are afraid that no such presumption can be raised in the instant case. Only with a view to satisfy itself this Court had directed the respondents 1 to 4 to produce the entire records but the concerned respondents had failed to comply therewith for reasons best known to it. But for the failure to produce records despite such direction a presumption could have been raised that official acts had been done in ordinary course of business. But in the instant case no document was appended with the failure report. The very fact that the respondent Nos. 1 to 4 failed and/or neglected to produce the records before this Court would attract an adverse inference that had such records been produced, the same would have gone against the contentions of the State. Reference in this connection may be made

in National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, .

The decision of the Apex Court in TELCO Convoy Drivers (supra) has to be considered in that light. Each case will have its own fact but in that case the Supreme Court in no uncertain terms has laid down the law mat while forming an opinion as to whether a reference should or should not be made, the Appropriate Government cannot make an attempt to adjudicate upon the dispute itself. Such a power which is within the domain of quasi judicial or a judicial authority does not come within the purview of Section 10(1) of the said Act. It is, therefore, not the case where on the basis of the materials available with it the Appropriate Government had bonafide arrived at a decision which cannot be interfered with by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. In fact in TELCO Convoy Drivers (supra) the Apex Court had not laid down any new law but has merely explained or clarified the legal position vis-a-vis the power of the Appropriate Government u/s 10(1) of the said Act. The decisions of the Supreme Court and the other High Courts are legion on this point. In Mihir Kumar hazra Chowdhury Vs. Union of India (UOI) and Others, G.N. RAY, J. referred to Bombay Union of Journalists (supra) M. P. Irrigation Karmachari Sangh v. State of M.P. and Anr. (supra) as also Ram Avtar Sharma and Others Vs. State of Haryana and Another, that in view of the provisions of Section 2-A read with Section 11-A the scope of reference has been widened. The Apex Court clearly held that while exercising its power u/s 10(1) of the said Act, the Central Government had clearly gone wrong in assessing the merits of the order which do not come within the purview of the administrative jurisdiction. In Nirmal Singh v. State of Punjab reported in (1984 I LLJ 396) (SC) CHANDRACHUD, J. speaking for a Division Bench of the Apex Court while dealing with a case of Branch Manager of the bank clearly held that the Labour Commissioner ought to have given reasons that the appellant was not a workman within the meaning of Section 2-A of the said Act.

The Apex Court inter alia held as follows:

"..... After all, the question as to whether the appellant is a "workman" is basically a question of fact. That is why, on the basis of the stray material before us we do not consider it available to decide that question."

The same legal principle would apply in all fours in the present case. It is not necessary to multiply decisions as several decisions had been taken in to consideration in Abad Dairy Dudh Vikreta Kendra Sanchalak Mandal (supra). It is true as has rightly been pointed out by Mr. Choudhury that in that case the High Court itself had gone into the merits of the matter. But while deprecating such a practice the Apex Court observed as follows:

"..... We 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" also one of the terms of reference. We say this because, though there are agreements between

the parties, not only is the interpretation of the agreement a matter of dispute; it will also be necessary to consider whether the agreement reflects the real position or whether the conduct of the parties and other material placed on record show that the appellants were employees as suggested by the appellants and not commission agents as suggested on behalf of the respondents. Also, the only ground on which the State Government declined to make a reference was that the appellants were not workmen. This view is not so obvious or patent on the facts before us. In the circumstances we think the best course is to set aside the order of the High Court and direct that the matter be gone into by an Industrial Tribunal after the Government has made an appropriate order. We, therefore, allow these appeals, set aside the order of the High Court and direct the State Government to refer to an Industrial Tribunal all the disputes between the parties including the preliminary question whether the appellants are workmen within the meaning of Industrial Disputes Act or not.

The State Government is directed to make the above reference within a period of two months from today."

For the purpose of arriving at a finding of the fact as to whether the person who has been discharged or dismissed by the employer was a workman or not the nature of duties performed by him is a relevant factor unless it is admitted that his duties are managerial or supervisory in nature. Techno clerical duties would not by themselves exclude a person from the purview of the definition of workman as contained in Section 2(s) of the Act. It is now well known that even highly paid persons have been held to be workmen. The task before the Government, thus, was not an easy one and in a majority of the cases if it intends to come to a finding as to whether a person is not a workman and not as of necessity it is bound to go deep into the matter. Such function should be left to the Industrial Tribunal by making a reference. We may however observe that this does not mean that the Appropriate Government in no case can arrive at such a conclusion. As indicated hereinbefore where the materials placed before the Appropriate Government, it becomes evident that the concerned employee does not answer the description of "workman" as defined in Section 2(s) of the said Act it would be free to refuse the exercise of its discretion in making a reference on the ground that no industrial dispute within the meaning of Section 2(k) exists.

12. In the instant case, the State Government has not asked itself the right, question so as to acquaint itself with the relevant facts with a view to arrive at a correct answer and thus has misdirected itself in law. The proper question which the State Government should have framed was as to what are the nature of duties of the respondent. It did not go into the said question at all.

13. It has also to be borne in mind that by reason of the provisions of the Industrial Disputes Act a new right had been granted to the workman. Before coming into force of the said Act the relationship of the employer and employee were used to be governed by contract of service. Even the workman could have

been dismissed from their services without assigning any reason, but therefore no civil suit for their reinstatement could have been maintainable in view of the provisions contained in Section 14 of the Specific Relief Act, 1963. Four exceptions exist to the aforementioned rule i.e. (1) when an employee enjoys a status; (2) where the employee is a workman within the meaning of the provisions of the Industrial Disputes Act; (3) where in discharging or dismissing an employee, the statutory authority has violated mandatory provisions of the statute or statutory rules; and (4) where services of a person had been terminated without following the statutory provisions to which protection he is entitled to.

14. In our opinion it cannot be said that there exists any hard and fast rule as regards a question as to whether the Court had power to direct the Appropriate Government to make a reference. Normally this Court would not do so but as would appear from the various decisions cited by Mr. Barat that the Supreme Court of India itself had directed the Appropriate Government to make references and even the terms of reference had been fixed by the Court.

15. In the instant case, as indicated hereinbefore, the Appropriate Government for some reasons or other refused to make a reference for a long time. The petitioner had to approach this Court and pursuant to the directions made by this Court the impugned order dated January 14, 1997 has been passed. It is also well settled in view of the decision of the Apex Court in *Comptroller and Auditor-general of India, Gian Prakash, New Delhi and Another Vs. K.S. Jagannathan and Another*, that in a given case the Court can exercise the same power which a statutory authority can exercise. In a case of this nature thus the discretion which could be exercised by the Appropriate Government in the facts and circumstances of the case could also be exercised by the learned Trial Judge. No illegality, thus, has been committed by the learned Judge in passing the impugned judgment.

16. However, there cannot be any doubt whatsoever that the learned Judge has committed an error in directing the State Government to make a reference as to whether the writ petitioner is a workman. The question as to whether the writ petitioner is a workman or not can only be adjudicated upon collaterally or as a preliminary issue and thus the reference is required to be made in terms of Section 2-A of the Act. The cross objection filed by Mr. Barat therefore succeeds and in modification of the directions issued by the learned Trial Judge we direct the State Government to make an appropriate reference keeping in view the nature of the dispute raised by the respondent and such a reference should be made at an early date and not later than one month from the date of communication of this order. Keeping in view the fact that the respondent Nos. 1 to 4 had failed to produce records despite an unequivocal order passed by this Court we are of the opinion that they should pay to the respondent penal costs which is assessed at 200 G.Ms. It could be open to the state to recover the said amount from the Officers concerned upon holding an enquiry in that regard.

17. For the reasons aforementioned the appeal preferred by the appellant is dismissed and the cross objection filed by the writ petitioner/respondent is allowed.

However, no cost is being awarded as against the Appellant. Prayer for stay is considered and refused.

All parties are to act on a signed copy of the operative part of this judgment on the usual undertaking.

S.N. Bhattachargee, J.:

I agree.