HIGH COURT OF GUJARAT

GM THAKER

Versus

STATE OF GUJARAT

Date of Decision: 24 March 2004

Citation: 2004 LawSuit(Guj) 183

Hon'ble Judges: H K Rathod

Eq. Citations: 2004 2 CLR 1095, 2004 102 FLR 1181, 2004 LabIC 2150, 2004 6 GHJ 97

Case Type: Special Civil Application

Case No: 1414 of 1996

Subject: Labour and Industrial

Editor's Note:

Labour law - misconduct - petitioners are not workmen u/s.2(5) of the Act - Jurisdiction - quasi judicial authority - conciliation officer has not jurisdiction to decide said issue.

Held - Impugned decision on merits like a quasi judicial decision and respondent has crossed the limit while exercising his powers therefore required to be quashed and set aside.

It is not a judicial or quasi judicial order, therefore, the material which has been relied by respondent no.2 are not only the material as produced by the respondent no.3 & 4 but there are other relevant material also which has not been taken into account by the respondent no.2 and there are voluminous records and evidence which are sought to be adduced by the petitioner association which requires detail examination in the matter and that can be satisfactorily examined by the Tribunal and not by the respondent authority. Therefore, according to my opinion, the decision which has been taken by the respondent no.2 is beyond the jurisdiction vested upon him. It is a clear decision on merits like a quasi judicial decision and, therefore, respondent no.2 has crossed the limit while exercising his powers u/s.10 read with Section 12 of the I.D.Act, 1947, therefore, it is without jurisdiction and require to be quashed and set aside.

(Para 9)

Acts Referred:
Industrial Disputes Act, 1947 Sec 10, Sec 10(1), Sec 2(s), Sec 12

Final Decision: Petition allowed

Advocates: P S Chari, Nanavati Associates

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[1] Heard the Learned Advocate Mr.Chirag M.Pawar on behalf of the petitioner, Mr.Chudgar appearing on behalf of respondent No. 3 & 4 and Learned AGP Mr.Kodekar appearing on behalf of respondent no.1 and 2.

[2] In the present petition, the petitioner has challenged the order passed by respondent no.2 dated 4th December, 1995 while exercising the power under Section 10 read with Section 12 of the I.D.Act, 1947. The respondent No.2 has decided not to refer the dispute for adjudication on the ground that members of the Petitioner Association are not workmen within the meaning of Section 2 (s) of I.D.Act, 1947. The affidavit in reply is filed on behalf of respondent no.3 and 4 and rejoinder is filed on behalf of petitioner. The petitioner has produced voluminous records in respect to duties and functions of the members of Petitioner Association for justification that they are the workmen within the meaning of Section 2 (s) of the I.D.Act, 1947. The affidavit in reply has been filed by respondent no.2 wherein he supported his order and made it clear that he has examined the dispute prima-facie after considering the salary, the duties, work and power as well as supervisory capacity of the members of Petitioner Association. Learned Advocate Mr.Pawar appearing on behalf of the Petitioner Association has submitted that respondent no.2 has committed jurisdictional error in passing the order dated 4th December, 1995. He also submitted that respondent no.2 has no jurisdiction to decide the merits of the dispute which has been raised by the petitioner. He also submitted that both the parties has produced the relevant record in respect to duties, work, power and supervisory capacity and after examining the said record the respondent no.2 has come to the conclusion that members of the Petitioner Association are not workmen within the meaning of Section 2(s) of I.D.Act 1947. Therefore, he submitted that it is clear decision like quasi-judicial authority and, therefore, such exercise of power is not permissible under the law and, therefore, order is bad. He also submitted that respondent no.2 have appeared to consider the only one fact that whether naturally dispute has existed between the parties or not. If naturally dispute has existed then it is enough for the respondent no.2 for referring the dispute for adjudication. The order which has been passed by respondent no.2 is an administrative order and not quasi-judicial order. Therefore, he has not to examine the merits or lis between the parties. He also submitted that looking to the language used in the order it is clear case of 100% a final conclusion on the issue and it is not merely

a prima-facie conclusion. Therefore, Mr.Pawar relied upon two decisions of Apex Court (1) in case of Telco Convoy Drivers Mazdoor Sangh V. State of Bihar reported in AIR 1989 Supreme Court page 1565 and (2) decision in case of Abad Dairy Dudh Vitran Kendra Sanchalak Mandal Vs. Abad Dairy and Ors. reported in 1999 Supreme Court Cases (L&S) page 1079.

[3] Learned AGP Mr.Kodekar appearing for respondent no.2 has submitted that respondent no.2 has rightly passed an order and he has not committed any error. He also submitted that respondent no.2 has to see the prima-facie merits of the dispute which has been raised by the Petitioner Association. That has been done by the respondent no.2 rightly and, therefore, the decision which has been taken is also legal and valid and within his jurisdiction. For that respondent no.2 has not committed any error.

[4] Learned Advocate Mr.Chudgar vehemently opposed the petition and submissions made by petitioner. He submitted that a detailed reply has been filed by respondent no.3 and 4 wherein at page 171 paragraph 8/2 the powers and functions of the members of the Petitioner Association are narrated. He submitted that they have power to sanction the leave, they have to assess the performance of workers and to submit the reports. They are the reporting authorities in case of misconduct of the workers and also authorise to issue warning letters. They are also actively associated in process of recruitment and promotion and also they are participating in interview, written test/job test. Therefore, according to Mr.Chudgar the members of the Petitioner Association are not covered within the definition of workmen. He also submitted that respondent no.2 has rightly examined the issue on the material produced before him and that was a prima-facie decision for that no jurisdictional error is committed by the respondent no. 2, which require any interference by this Court. In respect to his submission he relied upon the decision of Apex Court in case of Secretary, Indian Tea Association Vs. Ajit Kumar Barat and Ors. reported in 2000 Supreme Court Cases (L&S) page 321.

[5] I have considered the submissions made by all the three advocates. I have also gone through the petition as well as the reply filed by the respective parties and I have also considered the records produced by the petitioner along with the petition. The question is that respondent no.2 while acting under Section 10 read with Section 12 of the ID ACt, 1947 have no jurisdiction and power to decide the merits of the matter as if a quasi-judicial authority. This question has been examined by all the three decisions which has been relied by respective advocates. I have perused the orders by respondent no.2. After perusal clear conclusion has been arrived by the respondent no.2 on the basis of the material produced by the respective parties that member of Petitioner Association are working in a supervisory capacity and their nature of work is

managerial and, therefore, they are not covered within the definition of Section 2 (s) of I.D.Act 1947. The relevant Section 2 (s) of I.D.Act 1947 is quoted as under:

> "Workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceedings under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person- (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or (ii) who is employed in the police service or as an officer or other employee of a prison; or (iii) who is employed mainly in a managerial or administrative capacity; or (iv) who, being employed in a supervisory capacity draws wages exceeding one thousand six hundred rupees per mensem or exercise, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature.

[6] After perusal of the definition as referred above in para III and IV that employer namely in managerial and administrative capacity or who being an employee in a supervisory capacity draws wages exceeding Rs.1600.00 per mensem or exercise either by the nature of duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature. The Apex Court in number of cases examined the said question that what are the functions which are considered to be managerial nature and supervisory capacity. There are different duties depend upon the establishment, but there is no definition given under the act that what are the duties covered as managerial nature and what are the function as supervisory capacity. Therefore, each and every case depend upon the facts. Therefore, the reliance which has been placed by learned advocate Mr.Chudgar at page 171 that this members of the Petitioner Association having power to issue warning letter, sanction leave, participating in interview, written test, to submit appraisal report etc. are covered as a managerial nature function or supervisory capacity or not. These question requires detailed examination by leading proper evidence before the concerned Tribunal. Merely having some powers which normally a subordinate employees are not opposing it that itself is not sufficient to describe the function as a managerial in nature. Ultimately managerial nature and administrative nature and supervisory capacity are the function in which a concerned employee is free to take independent decision which will bind the Company or establishment. Therefore, so long the employee is not having power to take independent decision in respect to important issue which relates to managerial or

supervisory capacity which ultimately binds to the Company then other functions are covered within the definition of Section 2 (s) of the I.D.Act, 1947. That means to sanction the leave, to recommend for promotion, to fill up the C.R., participate in interview are not such powers which require to be taken by the concerned employee independently without any guidance of the higher authority and, therefore, merely describing as a managerial function or supervisory capacity or administrative nature are not enough to exclude such employee outside the scope of definition Section 2 (s) of the I.D.Act, 1947. Therefore, the test which has been laid down by the Apex Court in number of cases that test is required to be satisfied when the matter has been referred for adjudication before the Tribunal. The respondent no.2 merely considering the duties which is little than higher in comparison of the ordinary workmen has been treated as function as a managerial in nature, administrative in nature and supervisory capacity. The word supervisory has been interpreted by the Apex Court and in that interpretation the Apex Court has observed that such employee is entitled to take free, independent decision in respect to his duties and function which ultimately bind to the concerned employee and establishment or company. Therefore, looking to these duties, these are not the functions which are to be performed as an independent and free decision. Therefore, ultimately each employee has to work under the higher officer. These are the powers subject to confirmation from the higher authority. These are not independent powers and duty which require to be performed by employee. Therefore, the decision which have been taken by respondent no.2 merely considering the duties is not proper while exercising the powers under Section 10 read with Section 12 of the I.D.Act 1947. Looking to the language used by the conciliation officer, respondent no. 2, it is clear decision on merits that members of the Petitioner Association are not workmen. Therefore, according to my opinion said decision is beyond the jurisdiction of respondent no.2. These aspects has been examined by the Apex Court in Case of Telco convoy Drivers Mazdoor Sangh Vs. State of Bihar reported in AIR 1989 Supreme Court page 1565. The relevant paragraph 1,3, 14 and 16 are quoted as under:

> (1) While exercising power under S.10 (1) the function of the appropriate Government is an administrative function and not a judicial or quasi judicia 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 lis, which would certainly be in excess of the power conferred on it by S.10. It is true that in considering the question of making a reference under S.10 (1), the Government is entitled to form an opinion as to whether an industrial dispute "exists or is apprehended". But the formation of opinion as to whether an industrial dispute "exists or is apprehended" is not the same thing as to adjudicate the dispute itself on its merits. Where, as in the instant case, the dispute was whether the persons raising the dispute are workmen or not, the same cannot be decided

by the Government in exercise of its administrative function under S.10 (1) of the Act. The order of the Govt. refusing to refer the dispute on ground that the persons raising the dispute are not workmen is liable to be set aside. As the Govt. had persistently declined to make a reference under S.10 (1) the Supreme Court directed the Govt. to make a reference.

(3) The appellant Sangh represents about 900 convoy drivers. By a letter of demand dated October 16, 1986 addressed to the General Manager of the Tata Engineering and Locomotive Co. Ltd., Jamshedpur (for short "TELCO"), the Sangh demanded that permanent status should be given by the management to all the convoy drivers, and that they should also be given all the facilities as are available to the permanent employees of TELCO on the dates of their appointment. The said demand proceeds on the basis that the convoy drivers are all workmen of TELCO. The dispute that has been raised in the said letter of demand is principally whether the convoy drivers are workmen and/or employees of TELCO or not. In other words, whether there is relationship of employer and employees between TELCO and the convoy drivers.

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 under Section 10 (1) of the Act. As has been held in M.P. Irrigation Karamchari Sangh's case (supra), there may be exceptional cases in which the State Government may, on a proper examination of the demand, come to a conclusion that the demands are either perverse or frivolous and do not merit a reference. Further, the Government should be very slow the attempt an examination of the demand with a view to declining reference and Courts will always be vigilant whenever the Government attempts to usurp the powers of the Tribunal for adjudication of the valid disputes, and that to allow the Government to do so would be to render Section 10 and Section 12(5) of the Act nugatory.

16. It has been already stated that we had given one more chance to the Government to reconsider the matter and the Government after reconsideration has come to the same conclusion that the convoy drivers are not workmen of TELCO thereby adjudicating the dispute itself. After having considered the facts and circumstances of the case and having given our best consideration in the matter, we are of the view that the dispute should be adjudicated by the Industrial Tribunal and, as the Government has persistently declined to make a reference, under Section 10 (1) of the Act, we think we should direct the Government to make such a reference. In several instances this Court had to direct the Government to make

such a reference under Section 10 (1) when the Government had declined to make such a reference and this Court was of the view that such a reference should have been made.

See Sankari Cement Alai Thozhiladar Munnetra Sangam v. Govt. of Tamilnadu, (1983) 1 Lab LJ 460; Ram Avtar Sharma v. State of Haryana, (1985) 3 SCR 686 : (AIR 1985 SC 915); M.P. Irrigation Karamchari Sangh V. State of M.P. (1985) 2 SCR 1019 : (AIR 1985 SC 860); Nirmal Singh V. State of Punjab, (1984) 2 Lab LJ 396 : (AIR 1984 SC 1619).

[7] Similarly in case of Abad Dairy Dudh Vitran Kendra Sanchalak Mandal V. Abad Dairy reported in 1999 Supreme Court Cases (L&S) 1079, the same issue has been examined by the Apex Court that were Kendra Sanchalak is a workmen or not and ultimately Apex Court has referred the matter for adjudication to the concerned Tribunal. Initially in this case the Conciliation Officer has rejected to refer the dispute as they are not workmen. The Gujarat High Court has also dismissed petition of the workmen and ultimately Apex Court has allowed the petition and set aside the orders of Conciliation Officer of High Court and referred the matter for adjudication. The relevant paragraph 4 & 5 are quoted as under:

4. We have heard counsel for the appellants as well as counsel for the respondents. We are of the opinion that having regard to the facts of the case as well as the voluminous evidence sought to be adduced by both sides, the question as to whether the members of the Association are workmen or not requires detailed investigation of facts. It is true that there appeared to be certain agreements entered into between the respondents and the appellants but it is the case of the appellants that, agreement apart, there is plenty of evidence in the form of instructions and circulars issued by the respondents which would show that the members of the Association were really workmen and not commission agents as alleged. In fact, in pursuance of the permission given by this Court to file affidavits the parties have filed affidavits running to several pages setting out facts in support of their respective contentions. We have also heard both counsel for some time and are satisfied that the issue requires detailed examination of facts and can be satisfactorily adjudicated upon only by a tribunal.

5. We are of the opinion that neither a writ proceedings in the High Court nor an appeal under Article 136 is the proper forum in which these factual contentions and allegations should be gone into. The High Court itself has observed at various places in its judgment that the nature of the dispute between the parties and the facts and circumstances were such that a writ petition was not the appropriate forum to enter into such facts but seems to have allowed itself to be persuaded to

go into the question perhaps because the counsel on both sides were not averse to that course. 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 are 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 agreements 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 the Industrial Disputes Act or not.

[8] Recently the Apex Court has considered identical case in case of Sharad Kumar Vs. Govt. of NCT of Delhi and Ors. reported in 2002 AIR SCW 1670. The relevant para 27 and 29 are quoted as under: 27. In S.K.Maini V. M/s. Carona Sahu Company Limited and others, (1994) 3 SCC 510 this Court interpreting Section 2 (iv) made the following observations.

"9. After giving our careful consideration to the facts and circumstances of the case and the submissions made by the learned Counsel for the parties, it appears to us that whether or not an employee is a workman under Section 2 (s) of the Industrial Disputes Act is required to be determined with reference to his principal nature of duties and functions. Such question is required to be determined with reference to the facts and circumstances of the case and materials on record and it is not possible to lay down any strait-jacket formula which can decide the dispute as to the real nature of duties and functions being performed by an employee in all cases. When an employee is employed to do the types of work enumerated in the definition of workman under Section 2(s), there is hardly any difficulty in treating him as a workman under the appropriate classification but in the complexity of industrial or commercial organizations quite a large number of employees are often required to do more than one kind of work. In such cases, it becomes necessary to

determine under which classification the employee will fall for the purpose of deciding whether he comes within the definition of workman or goes out of it. In this connection, reference may be made to the decision of this Court in Oil Storage and Distribution Co.of India Ltd. v. Burmah shell Management Staff Assn. AIR 1971 SC 922. In All India Reserve Bank Employees' Assn. v. Reserve Bank of India, it has been held by this Court that the word 'supervise' and its derivatives are not words of precise import and must often be construed in the light of context, for unless controlled they cover an easily simple oversight and direction as manual work coupled with the power of inspection and superintendence of the manual work of others. It has been rightly contended by both the learned Counsel that the designation of an employee is not of much importance and what is important is the nature of duties being performed by the employee. The determinative factor is the main duties of the employee concerned and not some works incidentally done. In other words, what is, in substance, the work which employee does or what in substance he is employed to do. Viewed from this angle, if the employee is mainly doing supervisory work but incidentally or for a fraction of time also does some manual or clerical work, the employee should be held to be doing supervisory works. Conversely, if the main work is of manual, clerical or of technical nature, the mere fact that some supervisory of other work is also done by the employee incidentally or only a small fraction of working time is devoted to some supervisory works, the employee will come within the purview of 'workman' as defined in Section 2 (s) of the Industrial Disputes Act."

29. Testing the case in hand on the touchstone of the principles laid down in the decided cases we have no hesitation to hold that the High Court was clearly in error in confirming the order of rejection of reference passed by the State Government merely taking note of the designation of the post held by the respondent i.e. Area Sales Executive. As noted earlier determination of this question depends on the types of duties assigned to or discharged by the employee and not merely on the designation of the post held by him. We do not find that the State Government or even the High Court has made any attempt to go into the different types of duties discharged by the respondent with a view to ascertain whether he came within the meaning of Section 2 (s) of the Act. The State Government, as noted earlier, merely considered the designation of the post held by him which is extraneous to the matters relevant for the purpose. From the appointment order dated 21/22 April, 1983 in which are enumerated certain duties which the appellant may be required to discharge it cannot be held therefrom that he did not come within the first portion of the Section 2 (s) of the Act. We are of the view that determination of the question requires examination of factual matters for which materials in including oral evidence will have to be considered. In such a matter the State

Government could not arrogate on to itself the power to adjudicate on the question and hold that the respondent was not a workman within the meaning of Section 2 (s) of the Act, thereby terminating the proceedings prematurely. Such a matter should be decided by the Industrial Tribunal or Labour Court on the basis of the materials to be placed before it by the parties. Thus the rejection order passed by the State Government is clearly erroneous and the order passed by the High Court maintaining the same is unsustainable.

[9] In light of this above three referred decisions wherein case of Secretary, Indian Tea Association reported in 2000 Supreme Court Cases (L&S) 321, it has been relied by learned advocate Mr.Chudgar that it is a decision of two judges. The decision in case of Abad Dairy is a decision of three judges of the Apex Court. In the said decision the decision in Abad Dairy case has been considered. The observations made by the Apex Court in respect to Abad Dairy case is that the question requires detail investigation in view of voluminous evidence sought to be adduced but it is not so in the case in hand. Therefore, the distinguish feature from Abad Dairy case to the case above referred, decision of the Apex Court to voluminous evidence sought to be adduced which requires detail investigation. Similarly in the case of this present case the members of the Petitioner Association are in various numbers and voluminous record and evidence is sought to be adduced which require detail investigation. Therefore, this decision is not applicable to the facts of this case which has been relied by learned advocate Mr.Chudgar. However, the case of Abad Dairy is clearly covered by the facts of the present case because looking to the voluminous record sought to be adduced in respect to the duties, the function and power of the employee concerned which requires detailed investigation of the facts and such detailed examination can be satisfactorily adjudicated only by a Tribunal and not by respondent no.2. Therefore, the view taken by Apex Court in Abad Dairy case is the decision of three judges which is also identical to the facts of the present case and according to my opinion the decision of the Apex Court in Abad Dairy case is fully applicable to the facts of the present petition. Even in case of Indian Tea Association as referred above the Apex Court has on principle held that order passed by Conciliation Officer is an administrative order which involves no lis and is made on subjective satisfaction of the Government. It is not a judicial or quasi judicial order, therefore, the material which has been relied by respondent no.2 are not only the material as produced by the respondent no.3 & 4 but there are other relevant material also which has not been taken into account by the respondent no.2 and there are voluminous records and evidence which are sought to be adduced by the petitioner association which requires detail examination in the matter and that can be satisfactorily examined by the Tribunal and not by the respondent authority. Therefore, according to my opinion, the decision which has been taken by the respondent no.2 is beyond the jurisdiction vested upon him. It is a clear

decision on merits like a quasi judicial decision and, therefore, respondent no.2 has crossed the limit while exercising his powers u/s.10 read with Section 12 of the I.D.Act, 1947, therefore, it is without jurisdiction and require to be quashed and set aside.

[10] In result, the present petition is allowed, the order passed by the respondent no.2 dated 4th December, 1995 is hereby quashed and set aside with a direction to the respondent no.2 to reconsider the matter in light of Telco Case and Abad Dairy case and pass appropriate orders in accordance with law within a period of three months from the date of receiving the copy of the said order. Rule made absolute. No order as to costs.