HIGH COURT OF GUJARAT *(D.B.)*

SARABHAI CHEMICALS LIMITED BARODA
V/S
AMBARAM AMTHARAM PATEL

Date of Decision: 01 April 1976

Citation: 1976 LawSuit(Guj) 34

Hon'ble Judges: J B Mehta, T U Mehta

Eq. Citations: 1977 GLR 455, 1978 (1) LLJ 105, 1977 (35) FLR 15

Case Type: Special Civil Application

Case No: 29 of 1976

Subject: Labour and Industrial

Head Note:

Payment of Gratuity Act(XXXIX of 1972) S.2(e) & S.(4) Employee. Meaning there of employee receiving Rs.1000/- on initial employment and gradually gelling more than 1000/- doing supervisory and technical work. such employee entitled to gratuity under the act.

A gratuity is in its essence a payment in consideration of past service made only at the end of the said service when the employment terminates. Therefore the very essence of gratuity is the past and not the present. It is for this reason that the definition of the expression employee is couched in a language which admits of no periodical limitations. (Para 14) The main part of clause (e) of sec. 2 which contains the definition of the expres- sion employee has both positive and negative aspects. If both inclusive and exclusive clauses of the definition are read in this light it follows that a person who satisfies the requirements of the inclusive clause continues to be an employee till he is covered by the exclusive clause

without reference to any specific period of time. (Paras 14 & 15) The liability to pay gratuitY is already created by sec. 1(3) and which becomes crystalised. quantified and enforceable by virtue of the provisions contained in sec. 4. That being the position date on which the event contemplated by see. 4 occures cannot control either the liability of the employer or the operation of the definition of the expression employee given in sec. 2(e) of the Act. (Para 16) In this view of the matter if a person wants to take advantage of gratuity con- templated by the Act. he has to prove the following facts: 1 That at any time in the past during the course of his employment he was receiving the wages not exceeding Rs. 1000/- per mensem; 2 That this period of service was continuous for not less than S years; 3 That during this period he was not employed in a managerial or administrative capacity. (Para 17) The explanation to sec. 2(e) only emphasis the fact that even while construing the main portion of the definition of the expression employee and not a particular time or date which is to be taken into account. The mere fact that the respondent was receiving the wages of more than 1 0 per month or was working in a managerial capacity on the date on which he resigned would not disentitle him to the amount of gratuity contemplated by sec. 4 of the Act. (Para 18) Held that in the instant case the first duty as regards the distribution of work cannot be termed as purely supervisory duty. It was the supervisory duty wherein technical skill and knowledge of the respondent was also required to be utilised. The second duty in which an employee was required to take decision whether retest should be carried out or not is also purely a supervisory-cum-technical duty. (3) The risk taking i.e. the question that determines whether particular sample should be accepted or rejected is also purely technical in nature. None of these three duties cannot be terms as managerial or administrative. (Paras 19 to 22) Held that the duty to grant or reject leave can be termed as smacking of a managerial function but the decision to initiate disciplinary action is surely not a managerial function because the discretion which is contemplated by this duty is limited only to the extent of initiating an action. The question is whether such an isolanted function of granting or rejecting leave which is of the managerial type would justify the conclusion that the respondent was working in a managerial capacity after he was appointed as a Sectional Head ? (Para 24) In such cases the Court should ascertain as to what is the main or substantial work which an employee is employed to do. If it is the supervisory work it must be held that he was employed to do the supervisory work though he might also be doing some technical clerical or manual work. If on the other hand the supervisory work be incidential to the

main or substantial work of any other type namely clerical manual or technical the employment would not be in the supervisory capacity Applying these tests in the instant case there is no doubt that the main and sub- stantial type of the work was doing during the course of his employment after his appointment as a Sectional Head was supervisory-cum-technical and that managerial post of his work was merely incidental to it. (Para 25) Bennett Coleman and Co Pvt. Ltd. v. Punia Priya Das Gupta Burmah Shell Oil Storage & Distribution Co. of India Ltd. v. The Burmah Shell Management Staff Asson. Ors. Prem Sagar (T) v. Standard Vacuum Oil Co. Madras & Ors. referred to.

Acts Referred:
Payment Of Gratuity Act, 1972 Sec 2(4), Sec 2(e)

Final Decision: Petition dismissed

Advocates: K S Nanavati, I M Nanavati, V B Patel, S M Madan

Reference Cases:
Cases Cited in (+): **2**
Cases Referred in (+): **5**

Judgement Text:-

T U Mehta, J

[1] The petitioner herein is the company registered under the Indian Companies Act and is engaged in the business of manufacturing chemicals and pharmaceutical. By this petition it has prayed for a writ for quashing aside the orders passed by the Controlling Authority as well as the appellate authority under the Payment of Gratuity Act 1972, (which is hereinafter referred to as "the Act"), directing it to pay a sum of Rs. 6720/- as gratuity to the respondent.

[2] Short facts which form the background of this case are that the respondent, Ambaram Amtharam Patel, joined the services of the petitioner- Company at Baroda on 13th November, 1959 as Chemist. He worked as Chemist from the year 1959 to 1973. On 1st January, 1974 he was appointed as the Section Head of the Quality Control department. His pay upto 31st March, 1974 was Rs. 960/- per month but from 1st April,

1974, he was getting the salary of Rs. 1050/- per month. In the meanwhile i.e. on 16th September, 1972 when he was still working as Chemist and receiving salary below Rs. 1000/- per mensem, the Act came into force. Ultimately on 29th June, 1974, the respondent resigned.

[3] On his resignation, he was not paid any amount of gratuity under the Act. He, therefore, applied to the Controlling Authority, Baroda, for the payment of gratuity. The said authority found that he was entitled to the gratuity amount of Rs. 6720/-which was calculated for the period upto 31st March, 1974, when he was getting the salary of Rs. 960/-. per mensem. Being aggrieved by this decision, the petitioner approached the appellate authority established under the provisions of the Act. The said appellate authority confirmed the order of the Controlling Authority as regards gratuity. Hence, the petitioner-company has preferred this. Special Civil Application.

[4] The appellate authority found that the respondent is an "employee" as denned by sec. 2(e) of the Act, and, therefore, he was entitled to the amount of gratuity as quantified under sec. 4 of the Act, upto the period when his salary exceeded the amount of Rs. 1000/-.

[5] The contention which is raised on behalf of the petitioner by his learned advocate Shri Nanavati, is that the respondent is not covered by the definition of the term "employee" as given in sec. 2(e) of the Act, because, on the date on which he became entitled to the payment of gratuity under sec. 4, he was receiving the salary exceeding Rs. 1000/-per mensem. According to Shri Nanavati, therefore, the case of the respondent is excluded from the definition of the term "employee". Shri Nanavati, further contended that even otherwise looking to the nature of the duties, which the respondent was expected to discharge, it becomes clear that on the day on which the gratuity became payable to him under sec. 4 of the Act, he was employed in a managerial and administrative capacity and, therefore also, his case fell within the exclusion clause of the definition of the term "employee" given in sec. 2(e) of the Act.

[6] It is not in dispute that when the respondent resigned on 29th June, 1974 his salary was more than Rs. 1000/- as he was getting Rs. 1050/-per month. It cannot be disputed, looking to the provisions of sec. 4, that the amount of gratuity, if any, became payable to the respondent on 29th June, 1974 when he resigned from his post. The question, however, is whether the case of the respondent is not covered by the definition of the expression "employee" simply because on the date of his resignation, he was receiving

the salary of more than Rs. 1000/- per month. This question obviously involves the interpretation of cl. (e) of sec. 2 of the Act.

[7] Before interpreting this clause, it would, however, be necessary to note the nature of the duties which the respondent was discharging at the time when he put his resignation. The appellate authority has described these duties in his judgment, as under :

> 1. He was distributing work to different chemists who were 4 in number in his department depending upon the nature of samples to be dealt with and depending upon the calibre of the chemist concerned.
>
> 2. After the test results were obtained, he was required to take decision about submitting of reports after retest.
>
> 3. Risk taking i.e. whether in spite of some impurity, the samples should be accepted or rejected.
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> 4. To grant or reject leave and to take the decision whether to initiate disciplinary action or not against the employees of the quality control department.
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> Shri Patel, who appeared on behalf of the respondent, has contended that since these duties are not mentioned in the order of the Controlling Authority, he does not admit that these were the duties which were discharged by the respondent during the course of his employment, as the Section Head of the Quality Control Department.

[8] We find that these duties are mentioned by the appellate authority in his order, and are also mentioned in the writ petition. There is nothing to show that the respondent controverted the petitioner's allegations as regards these duties. Therefore, we proceed on the basis that the respondent discharged the above duties during the course of his employment at the time when he put his resignation.

[9] Before considering whether the discharge of the above referred duties amounted to

the discharge of managerial functions, we first pro pose to take up for our consideration the question whether the respondent is not entitled to get any benefit of the provisions of the Act merely because on the date on which he resigned he was getting the salary which was more than Rs. 1000/- per month and was working in a managerial capacity.

[10] The contention of the learned advocate of the petitioner is that in order to be an "employee" as defined in sec. 2(e) of the Act, the res pondent should not be found to be getting the salary which is more than Rs. 1000/- per month, or employed in managerial or administrative capa city on the date on which his cause of action to receive gratuity arose under sec. 4 of the Act. According to him, the respondent would not have been entitled to get any gratuity before the occurrence of one of the things mentioned in sec. 4, namely, superannuation, retirement or resigna tion, and death or disablement. Therefore, contended Shri Nanavati, what is necessary is to find whether at the time of the occurrence of the event, the respondent was an "employee" as defined in sec. 2(e) of the Act. He pointed out that if the problem is looked at from this angle, the respon dent would not be entitled to get any gratuity because on the date of his resignation, he was holding a managerial post and was getting a salary of more than Rs. 1000/- per month and, therefore, he was not an "employee" as defined by sec. 2(e) of the Act.

[11] Sec. 2(e) of the Act, is in the following terms :

> "(a) "employee" means any person (other than an apprentice) employed on wages, not exceeding one thousand rupees par mensem, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled semiskilled or unskilled, manual supervisory technical or clerical work, whether the terms of such employment are express or impelled, but does not include any such person who is employed in a managerial or administrative capacity, or who holds a civil post under the Central Govt, or a State Government, or who is subject to the Air Force Act, 1950 the Army Act, 1950 or the Navy Act, 1957.
>
> Explanation : In the cases of an employee, who, having been employed for a period of not less than five years on wages not exceeding one thousand rupees per mensem, is employed at any time thereafter on wages exceeding one thousand rupees per mensem, gratuity, in respect of the period during which such employee was employed on wages not exceeding the one thousand rupees per mensem, shall be determined on the basis of the

wages received by him during that period."

Sec. 4 of the Act says that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than 5 years : (a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. There are two provisoes and one Explanation attached to this clause (c) but in this case we are not concerned with them.

[12] On plain reading of the definition of the expression "employee" as given in the above referred cl.(e) of sec. 2 we find that the contention raised by Shri Nanavati on its interpretation is unacceptable as it seeks to add some more words to the above quoted definition by limiting its operation with reference to a particular date, even though the words and language of the clause are wide enough to cover the case of an employee, who has held a non-managerial or non-administrative post and has received wages of not more than Rs. 1,000/- per month at any time in the past.

[13] The definition clause obviously speaks of "a person employed on wages". It does not use the word "employee" with reference to any speci fied period of time. In other words, the employment which contemplated here is employment simpliciter without being hedged by any condition as regards time. This will be evident from the following analysis of this definition.

[14] The main part of cl. (a), which contains definition of the expression "employee" has both positive and negative aspects. The posi tive aspect prescribes the positive requirements of being an employee which are that only that person is an employee :

(a) who is employed on wages not exceeding Rs. 1,000/- per month,

(b) whose employment must be in any establishment, factory, mine, oilfied, plantation, port, railway company or shop; and-

(c) whose employment must also be to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work.

The negative aspects are covered by the clause of exclusion, which says that the expression "employee" does not include any person :

(a) who is employed in a managerial or administrative capacity :

(b) who holds a civil post under the Central Government or a State Government;

(c) who is subject to the Air Force Act, 1950, the Army Act, 1950 or the Navy Act, 1957.

This exclusion clause uses the word "is employed". These words also cannot be construed as referring to any specific period of time and certainly not to the time when the occasion to apply the provisions of sec. 4 arises, in view of the fact that the language of his clause (e) of sec. 2 does not justify any such limitation. Similar situation was considered by the Supreme Court in Bennett Coleman and Co. Pvt. Ltd. v. Punya Priya Das Gupta, A. T. R. 1970 S. C. 426. The Supreme Court in that case considered the provisions contained in cl. (f) of sec. 2 of Working Journalists (Conditions of Service) and Miscellaneous Provisions Act (1955). According to this clause, a "working journalist" means "a person whose principle a vocation is that of a journalist, and who is employed as such in, or in relation to, any newspaper establishment". In view of the use of the words "is employed", a contention which was raised before the Supreme Court, was that since the respondent workman was not in continuous employment at the time he filed his claim in the Labour Court, he was not a working journalist, and his case did not fall within the definition contained in cl. (f), and, therefore, he was not entitled to avail himself of the provisions of the above referred Working Journalists Act. This contention was rejected by the Supreme Court holding that the expression "who is employed" in sec. 2(f) of the Act, was not restricted to a newspaper employee, who was presently employed in a newspaper establishment, but it also related to an ex-employee, whose employment had come to an end as a result of acceptance of his resignation and, therefore, such an ex-employee could also resort to the provisions of the Act. While taking this view, the Supreme Court has made the following pertinent

observations :

"The scheme of all Acts dealing with industrial questions is to permit an ex-employee to avail of the benefits of their provision, the only requirement being that the claim in dispute must be one which has arisen or accrued whilst the claimant was in the employment of the person against whom it is made." (emphasis supplied by us).

The portion emphasised from the above excerpt taken from the said Supreme Court decision clearly brings out the ratio that if the claim has arisen or accrued whilst the claimant was in employment, the use of the present tense would not be a determinant factor, and such a use of the present tense must be construed with reference to the scheme and object of beneficial legislations. The obvious object of the Gratuity Act is to provide for a scheme for the payment of gratuity to certain categories of employees engaged in certain specified types of concerns. Gratuity is, in its essence, a payment in consideration of past service, made only at the end of the said service, when the employment terminates. Therefore, the very essence of gratuity is the past and not the present. It is for this reason that the definition of the expression "employee" is couched in a language which admits of no periodical limitations.

[15] If, therefore, both inclusive and exclusive clauses of the definition are read in this light, it follows that a person, who satisfies the requirements of the inclusive clause continues to be an "employee" till he is covered by the exclusive clause without reference to any specific period of time. Any attempt to find whether his case is covered either by the inclusive or by the exclusive clause on a particular day or at a particular point of time, would amount, to doing violence not only to the plain language of the definition, but also to the original intention and object with which the statute was enacted.

[16] Shri Nanavati put great stress on the fact that the cause of ac tion in favour of a particular employee to get gratuity arises under sec. 4 only on the happening of a particular event. We, however, do not find that the happening of the event, contemplated by sec. 4, controls in any manner, the wide amplitude of the definition contained in sec. 2(e). Sec. 4 does not create a liability to pay gratuity. This liability is

already ere ated by sec. 1(3) which makes the Act applicable to certain specified concerns. What sec. 4 provides is the quantification and payability of the amount of gratuity, the liability regarding which is already created. In other words, the liability, which was inchoate, becomes crystalised, quantified and enforceable by virtue of the provisions contained in sec. 4. That being the position, the date on which the event, contemplated by sec. 4 occurs, cannot control either the liability of the employer or the operation of the definition of the expression "employee" given in sec. 2(e) of the Act.

[17] In this view of the matter, if a person wants to take advantage of gratuity contemplated by the Act, he has to prove the following facts :

1. That at any time in the past during the course of his employment, he was receiving the wages not exceeding Rs 100/- per mensem;

2. That this period of service was continuous for not less than 5 years;

3. That during this period, he was not employed in a managerial or administrative capacity.

If a person proves these three facts, then he would be entitled to the gratuity contemplated by the Act, irrespective of the question whether subsequent to this period of 5 years, he began to receive wages exceeding Rs. 1000/- per month or was working in a managerial or administrative capacity.

[18] At this stage, notice should also be taken of the provisions of the Explanation, which is attached to the main definition of the expression "employee". According to this Explanation, an "employee" who having been employed for a period of not less than 5 years on wages not exceeding Rs. 1000/- per month begins to get wages exceeding this amount at any time after the said period of 5 years, would be entitled to get the gratuity in respect of the period during which he was employed on the wages not exceeding Rs. 1003/- per month. This Expla nation reveals very clearly that it is the whole period of employment of an employee which is to be taken in to account in order to determine whe ther he has received wages of an amount not exceeding Rs. 1000/- and if so, from what date. The Explanation, therefore, only emphasises the fact that even while construing the main portion of the definition of the expression "employee," it is the whole

period of his employment, and not a particular time or date which is to be taken into account. In our opinion, therefore, the mere fact that the respondent was receiving the wages of more than Rs. 1000/- per month, or was working in a mana gerial capacity on the date on which he resigned, would not disentitle him to the amount of gratuity contemplated by sec. 4 of the Act.

[19] This brings us to the next question whether looking to the duties which the respondent was discharging after he was promoted as sectional Head, can it be said that he was discharging managerial or administrative functions. We have already quoted above the nature of the work which was entrusted to him from 1st January, 1974 onwards when he was appointed as the Sectional Head of the Quality Control Department. First three duties, which are mentioned above, do not show anything which can be termed as managerial in character. The first duty was as regards the distribution of work to different Chemists who were four in number in his department. This distribution of work depended upon the nature of the samples to be dealt with and also depended upon the calibre of the Chemist concerned. It, therefore, follows that while deciding whether a particular sample should be dealt with by a particular Chemist, the respondent was surely called upon to utilise his technical skill and knowledge. Therefore, the duties mentioned in the first item cannot be termed as purely supervisory duty. It was the supervisory duty wherein the technical skill and knowledge of the respondent was also required to be utilised. Thus the duties mentioned in item no. 1 were supervisory and technical, but even if it is believed that they were predominantly supervisory duties, it cannot be said that they were either managerial or administrative functions. As a matter of fact, it is not the case of the petitioner that the initial selection of the sample which were required to be tested was to be made by the respondent. This initial selection depended merely upon the manufacturing policy which the concern wanted to adopt. The respondent had absolutely no choice in this policy and, therefore, he was expected to carry out only the work of distribution of these samples to different Chemists working under him keeping in mind the nature of these samples and the calibre of the Chemists concerned. Therefore, these duties can be treated only as supervisory-cum-tech-nical in nature.

[20] The duty mentioned in item No. 2 is that after the test results were obtained, the respondent was required to take decision whether retest should be carried out. This is also purely a supervisory-cum-technical duty. His decision whether retest is required or not, surely called for his technical knowledge and skill, and the act of ordering the retest was merely an act which a supervisor would undertake. At any rate, there is no element

of managerial or administrative function even in duty which is mentioned at item no. 2.

[21] The third item is about the "risk taking" i.e. it was for the respondent to determine whether particular sample should be accepted or rejected inspite of some impurity contained therein. In our opinion, this type of duty is purely of a technical nature, because, as a technical man, it was the respondent, who could take a decision whether the impurity in question would ultimately damage the end product, and if so, to what extent. There is nothing managerial or administrative in this type of function.

[22] Thus we find on analysis of all the three duties mentioned in items nos. 1, 2 and 3, that none of them can be called either managerial or administrative.

[23] The fourth item mentions the duty to grant or reject leave and to take the decision as to whether a disciplinary action should be initiated against any of the employees working in the Quality Control Department. Here the only duty which can be termed as smacking of a managerial function is the duty to grant or reject leave. The decision to initiate disciplinary action is surely not a managerial function because the discretion which is contemplated by this duty is limited only to the extent of "initiating" an action. It would have been a different matter had it been the duty of the respondent to take final decision on a disciplinary action initiated by him.

[24] Thus, the analysis of all the duties, which the respondent was discharging, shows that the only duty which can be termed as managerial in character, was to grant and reject leave of the employees working in his section. The question therefore, is whether the discharge of such an isolated function, which is of managerial type, would justify the conclusion that the respondent was working in a managerial capacity after he was appointed as Sectional Head.

[25] Legal position on this question is very well settled by the decision given by the Supreme Court in Burmah Shall Oil Storage & Distribution Co. of India Ltd. v. The Burma Shell Management Staff Association and others, A I.R. 1971 S.C. 922. There, the Supreme Court has inter alia considered the case of those employees who are employed to do the work of more than one of the kinds mentioned in the definition of sec. 2 (s) of Industrial Disputes Act No. 14 of 1947. The Supreme Court has observed that freque ntly an employee is required to do more than one kind of work. He may be doing the manual work as well as clerical work. He may be doing technical work as well as supervisory work. In such cases, it would be necessary to determine under which classification he will fall for the purpose of finding out whether he does not go out of the

definition of "workman" under the exceptions. After reviewing the case law on the subject, the Supreme Court has observed in that case that it is a settled principle of law that of workman must be held liable to do that work which is the main work he is required to do even though he may be incidentally doing other types of work. In such cases, therefore, the court should ascertain as to what is the main or substantial work which an employee is employed to do. If it is the supervisory work it must be held that he was employed to do the supervisory work though he might also be doing some technical, clerical or manual work. If on the other hand, the supervisory work be incidental to the main or substantial work of any other type, namely, clerical, manual or technical, the employment would not be in the super visory capacity. Applying this test to the facts of the present case, we have no doubt in our mind that the main and the substantial type of work which the respondent was doing during the course of his employment after his appointment as a Sectional Head, was supervisory cum-technical and that managerial part of his work was merely incidental to it.

[26] In Prem Sugar (T). v. Standard Vacuum Oil Co. Madras & ors, A.I.R. 1965 S.C. 111, the Supreme Court has referred to some of the tests which can be profitably applied to determine the status of an employee for the purpose of deciding the question as to whether he is a person in the position of a manager within the meaning of sec. 4(1)(a) of the Madras Shops and Establishments Act. These tests have been referred to. by the Supreme Court in the following observations :

> "It is difficult to lay down exhaustively all the tests which can be reasonably applied in deciding this question as several considerations would naturally be relevant in dealing with this problem. It may be enquired whether the person and a power to operate on the bank account or could he make payments to third parties and enter into agreements with them on behalf of the employer, was he entitled to represent the employer to the work at large in regard to the dealings of the employer with strangers, did he have authority to supervise the work of the clerks employed in the establishment, did he have control and charge of the correspondence, could he make commitments on behalf of the employer could he grant leave to the members of the staff and hold disciplinary proceedings against them, has he power to appoint members of the staff or to punish them; these and similar other tests may be usefully applied in determining the question about the status of an employee, in relation to the requirements of sec. 4(1) (a). The salary drawn by the employee may have no significance and may not be material, though

it may be treated theoretically as a relevant factor."

If these tests are applied to the facts of the present case, it becomes clear that the respondent was not discharging any of the managerial functions. For instance he had no power of appointment of labour, no power to take disciplinary action as a result of an inquiry, against his subordinates, no discretion in the matter of incurring expenditure of his own accord, no power to run the concern for any matter whatever, no power to make selection of the quality of a particular sample and no power to take any policy decision as regards the manufacturing of a particular sample.

[27] In view of these findings, it must be concluded that the respondent was never working in managerial capacity upto the date of his resignation. However, as already noted above, even if it is held that at the time when he resigned from his post, he was discharging hit duties in manage rival capacity that does not effect the merits of his case because, the definition of the word "employee" is not found to be controlled by any specific point of time and hence if it is found that the respondent had worked for a period of 5 continuous years as a supervisor-cum-technical employee and had received wages less than Rs. 1000/- per month, for the said continuous period of 5 years, he would surely be entitled to the gratuity as quantified under sec. 4 of the Act on his retirement or resignation.

[28] We, therefore, find that the view taken by both the lower autho rities is correct. This special Civil Application therefore fails and the same is dismissed and rule is discharged with costs.

[29] Shri Nanavati orally prays for leave to appeal to the Supreme Court. The said leave is refused as we find that the case does not involve any substantial question of public importance, which requires to be determined by the Supreme Court.

[30] On the request of Shri Nanavati, it is further ordered that the respondent shall not withdraw the amount deposited with the controlling authority by the petitioner for a period of 6 weeks from to-day.

Petition dismissed : Leave to appeal refused.